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CASES

ON THE

LAW OF AGENCY

SELECTED AND ARRANGED

BY

GEORGE L. REINHARD, LL. D.
Late Dean of Law Faculty, Indiana University

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PUBLISHER'S NOTE

These cases were selected and prepared in part for publication by Judge Reinhard with especial view for use in his classes in the Indiana University Law School.

Before the editorial work was completed Judge Reinhard's death occurred, and the task of completing the manuscript and its final revision for the printer devolved upon others. The publishers, in accepting this responsibility, have endeavored to carry out the intent of the editor that the selection should be representative and well adapted for students' use.

For the two years past the cases have been carefully and critically gone over, annotated, and tested by class-room use.

This selection is now presented as a memorial to the late Dean Reinhard, whose high qualifications as a jurist, administrator, author and teacher were so generally recognized during his lifetime.

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CASES ON AGENCY

CHAPTER I

NATURE AND KINDS OF AGENCY

Section 1.—Definition of Agent

STATE v. HOWARD.

1897. Supreme Court of Errors. 69 Conn. 707.

Appeal from district court, Fairfield county. The defendant was convicted for misdemeanor. Error; no order overruling the motion in arrest for insufficient information appear.

Judgment reversed.

Torrance, J. (after stating the facts).—The principal question presented for determination is whether a receiver who collects fire insurance money which comes into his hands as receiver, or fails to account for and pay over the same on demand, is subject to prosecution and punishment as for embezzlement. The defendant was prosecuted under the statute that makes an agent and officer, or person in a position of trust, of the General Assembly, or any county, town, city, or borough, who shall embezzle any money which shall be received by him by virtue of his office or agency, and, after demanding the same or having been charged on account therefor, shall refuse or neglect to pay the same within ten days, guilty of larceny. The statute does not say that the money embezzled must have been received by the agent directly from the principal, or that it must have been received in the course of employment, or in the capacity of corporate agent, or public officer, or that it must have come into the agent's hands by virtue of his office or agency. It is enough if it was received by him by virtue of his office or agency. The question to be answered is the common one in this country, as to who is an agent, or what is the meaning of the word "agent" as used in the statute. The contention of the defendant is that the relation of agent or employé, mentioned, must exist between a principal and an agent, which excludes from it the person for whom a debt is due. A debtor

CASES ON AGENCY

CHAPTER I.

NATURE AND KINDS OF AGENCY.

Section 1.—Definition of Agent.

STATE v. HUBBARD.

1897. Supreme Court of Kansas. 58 Kan. 797.

Appeal from district court, Shawnee county. The defendant was indicted for embezzlement. From an order overruling the motion to quash the indictment, defendant appeals.

Johnson, J. (after stating the facts)—The principal question presented for determination is whether a receiver who unlawfully appropriates money which comes into his hands as receiver, or fails to account for and pay over the same on demand, is subject to prosecution and punishment as for embezzlement. The defendant was prosecuted upon the theory that he was an agent, and under that portion of paragraph 2220 of the General Statutes of 1889 which provides: "If any agent shall neglect or refuse to deliver to his employer or employers, on demand, any money, bank bills, treasury notes, promissory notes, evidences of debt, or other property which may or shall have come into his possession by virtue of such employment, office or trust, after deducting his reasonable or lawful fees, charges or commissions for his services, unless the same shall have been lost by means beyond his control, before he had opportunity to make delivery thereof to his employer or employers, or the employer or employers have permitted him to use the same, he shall upon conviction thereof be punished in the manner provided in this section for unlawfully converting such money or other property to his own use."

Is a receiver an "agent," within the meaning of the quoted section? The contention of the defendant is that the relation of agency, as ordinarily understood, does not exist between a receiver and the court which appoints him or the parties for whom he acts. A ma-

jority of the court agree with this contention, and are of opinion that a receiver is not an agent, within the meaning of the statute. It is held that, in construing a criminal statute, words must be given their ordinary meaning, unless it is clear that another was intended, and that to place receivers in a class with agents requires an unusual and strained construction of the statutory language. It does not appear that receivers have ever been designated as agents in our statutes or in the decisions of the court, and, as an evidence that they were not within legislative contemplation, attention is called to the fact that in the first part of the section mention is made of executors, administrators, guardians and others, vested with official functions somewhat similar to those exercised by receivers, but no mention is made of receivers. It is argued that, if the legislature had intended to make receivers subject to the penalties of that statute, they would have been specifically enumerated with the others of the same general class. The gist of the offense prescribed by the statute is neglect or refusal of an agent "to deliver to his employer or employers on demand any money," etc., and it is said that this statute manifestly contemplates that the agent mentioned shall have an employer. Can it be said that the court is the employer of the receiver, or that he is employed by the parties to the action wherein the receiver is appointed? The court does not pay the receiver, and is not an employer as the term is ordinarily understood. So, it is said that the parties litigant cannot be said to have employed him, because they did not consent to his appointment, and he does not act under their orders or directions. A receiver is generally regarded as an officer of the court, and subject to its orders and directions. The property or money which comes into his hands as such officer is regarded as being in *custodia legis,* to be delivered or paid over to those who may establish a right to the same. He stands in an indifferent attitude, not representing the plaintiff or the defendant, but really representing the court, and acting under its direction, for the benefit of all the parties in interest. He has no powers other than those conferred by his appointment, and being but the hand or arm of the court itself, the conclusion is that he does not stand in the relation of agent to the court or to the parties in litigation. The writer is unable to reach this conclusion. The term "agent" is one of wide application, and as used in the statute it seems to fairly include receivers. "Agency is the relation, created either by express or implied contract, or by law, whereby one party *sui juris,* called the principal, constituent, or employer, delegates the transaction of some lawful business, with more or less discretionary power, to another party, called the agent, attorney, proxy, or delegate, who undertakes to manage the affair and render to him an account thereof." 1 Am. & Eng. Enc. Law (2d Ed.) 937. Webster defines an "agent" as "one who acts for or in the place of another, by authority from him." To constitute agency in its broader sense, it is not essential that it should be created

by agreement or contract; it may arise under the law, and any one who represents another or undertakes to do something for him and on his authority is properly designated as an "agent." To the mind of the writer the term "agent" was not used in the statute in a limited sense. Instead of using restrictive language, expressions denoting the widest application are employed. For instance, the words "any agent" are used; and, in treating of the money or property for which he must account it speaks of that which comes into his possession by virtue of "such employment, office or trust." The words last quoted certainly broaden the meaning of the term "agent," and indicate that the legislature did not intend to confine it to agencies arising under a mere contract, but rather that it should extend to agencies possessing the trust or official character as well. In State v. Bancroft, 22 Kan. 170, it was contended that the word "agent" was used in a limited sense; and it was there held that, "if the legislature had intended to limit this provision to the agents previously enumerated, it would naturally have said 'any such agent,' and that, failing to use that or some similar term, and in fact using the comprehensive expression 'any agent,' it intended to include every agent." In State v. Spaulding, 24 Kan. 1, the city clerk, who was prosecuted for the embezzlement of license fees, and which had not been paid to the city treasurer, contended that he was not the agent of the city, within the meaning of the law, and it was held that, when one assumes to act as the agent of another, he may not, when challenged, deny his agency, and "that one who is agent enough to receive money is agent enough to be punished for embezzling it." In another embezzlement case, against a county treasurer, it was contended that he had no employer, in the sense in which that term was used in the statute; but the court gave no ear to the contention, and held that, although he was an officer, the public might be regarded as his employer, and that he was therefore subject to prosecution for the embezzlement of the public funds. State v. Smith, 13 Kan. 274, 294.

While a receiver is an officer of the court, and acts under its orders and instructions, his relation to the court and to the parties in litigation is that of agency. He represents the court and the parties, and acts for them all in the transaction of the business for which he was appointed. The defendant here was intrusted with the property and business of the state printing establishment and, as receiver, he had business transactions with hundreds of persons and corporations in and out of the state. In dealing with these parties he represented the court and those who owned an interest in the printing plant and business. They may properly be regarded as the principal or principals, and he as the agent, representing them, and transacting the business under the authority and direction of the court. In 20 Am. & Eng. Enc. Law 158, it is said that "the relation of a receiver to the court appointing him is one of agency;" and so it would ap-

pear that, when the statute employs language indicating that the term "agent" is to be applied in its wider sense, it should be held to include receivers. See also, Ellis v. Little, 27 Kan. 707. It can hardly be that the legislature, which apparently was endeavoring to reach every one guilty of embezzlement, intended to exempt a class of persons intrusted with property and funds so numerous as receivers; and, unless they are held liable within the provisions of this statute, they cannot be punished for embezzlement. As a majority of the court are of opinion that they are not included within the terms of the statute, it must be held that the court erred in overruling the motion to quash the information. The judgment of the district court will be reversed, and the cause remanded, with direction to discharge the defendant.

DOSTER, C. J., concurring. JOHNSTON, J., dissenting.

ALLEN, J. (concurring specially). It is apparent that the information was framed to charge the defendant with embezzlement under the last part of paragraph 2220, which relates to agents only, and that the case was tried on the theory that he was so charged. That a receiver is not an agent, having an employer to whom he is bound to account and pay over the money received, within the usual meaning of the words, seems to me reasonably clear. Whether a receiver might be charged and convicted of embezzlement under the first part of the paragraph is a question concerning which I am unable to find a satisfactory answer. Receivers are not named, nor do they fall strictly within any class of persons mentioned in the section; yet it would seem to be in the nature of things the same offense for a receiver to convert to his own use trust funds in his hands as for any person belonging to either of the classes mentioned to convert like funds in his hands.[1]

[1] "The term agent may, therefore, be said to apply to any one who by authority performs an act for another." Hadley, J., in Wynegar v. State, 157 Ind. 577, 579.

See article, "Agency," by O. W. Holmes, Jr., in 4 Harv. Law Rev. 345–364 and 5 Harv. Law Rev. 1-23. See also article, "Of the Nature of Agency," by Everett V. Abbot, 9 Harv. Law Rev. 507–520.

See brief discussion of the *mandatum* of the Roman Law in Story on Agency (8th ed.), § 4.

On the distinction between an agency and a partnership, see Person v. Carter, 7 N. Car. 321, 324.

Section 2.—Relations Between Agent and Servant.

SILVERS & CO. v. SILVERS AND OTHERS.

(1899. Supreme Court of Indiana. 15 Ind. App. 80.

Action by Silvers & Co. against Silvers and Silvers on a promissory note alleged to have been executed by defendants to the former. The complaint alleged that the note had been changed by the payee, without the consent of defendants or plaintiff, after the execution of the note was procured through one Nichols, a traveling salesman of the plaintiff, who had authority from plaintiff to obtain such note from defendants. But after the note had been written and signed by defendants and delivered to Nichols to be by him delivered to the plaintiff, Nichols altered the note so as to make it payable on demand from date of its execution instead of from the time of maturity, and the alteration was made in the absence and without the knowledge or consent of either plaintiff or defendants; that the note was delivered by the latter to plaintiff in the altered state, and that plaintiff never, in any way, assented to or approved of such alteration. The suit was on the note in its original state. To this complaint the defendants demurred generally to the complaint. The circuit court sustained the demurrer and rendered judgment for the defendants. One of the principal questions in the case was whether or not Nichols made the alteration of the note, as alleged in the complaint, he sustained the relation of agent to the plaintiff so as to render the act of alteration an act for which plaintiff was responsible; for if the alteration was material and was made by the plaintiff's agent, the note would thereby become void and void, whereas although the alteration was material yet if it was made by a mere stranger it would be but a nullity and would not destroy it.

Lotz, J. [After holding certain other points.]

The charges in the note were not made by the plaintiff's order or direction, but it introduced certain testimony to show that its agent, and such person made the alteration. If the alteration was made by the agent while in the transaction of the principal's business and in the scope of his authority, then the act of the agent is the act of the principal. *Qui facit per alium facit per se.* The solution of this case depends upon the relation existing between Nichols and the plaintiff, at the time the alteration was made. If he was the plaintiff's agent, and the act was within the scope of his authority, then his act must be deemed the act of the plaintiff and the loss is with the defendants. If his position was that of a mere stranger to the note, then the loss is with the plaintiff. * * *

The complaint further avers that Nichols was the agent of the payee in making the alteration. But he was acting in the line of his agency and within the scope of his employment; that his wrongful act in the

Section 2.—Distinction Between Agent and Servant.

KINGAN & CO. v. SILVERS AND OTHERS.

1895. APPELLATE COURT OF INDIANA. 13 Ind. App. 80.

KINGAN & Co. sued Silvers and Silvers on a promissory note alleged to have been executed by the latter to the former. The complaint alleged that the note was executed in settlement of a debt owing by defendants to plaintiff; that the execution of the note was procured through one Nichols, a traveling salesman of the plaintiff who had authority from plaintiff to obtain such note from defendants; that after the note had been written and signed by defendants and delivered to Nichols to be by him conveyed to the plaintiff, Nichols altered the note so as to make it provide for interest from date of its execution instead of from the time of maturity; that the alteration was made in the absence and without the knowledge or consent of either plaintiff or defendants; that the note was delivered by Nichols to plaintiff in its altered state, and that plaintiff never, in any way, ratified or approved of such alteration. The suit was on the note in its original state. In the circuit court the defendants demurred generally to the complaint. The circuit court sustained the demurrer and rendered judgment for the defendants. One of the principal questions in the case was whether at the time Nichols made the alteration of the note, as alleged in the complaint, he sustained the relation of agent to the plaintiff so as to render the act of alteration an act for which plaintiff was responsible; for if the alteration was material and was made by the plaintiff's agent, the note would thereby become null and void, whereas although the alteration was material yet if it was made by a mere stranger, it would be but a spoliation and would not destroy it.

LOTZ, J. [After deciding certain other questions.]

The change in the note was not made by the plaintiff's order or direction, but it entrusted certain business to another as its agent, and such person made the alteration. If the alteration was made by the agent while in the transaction of the principal's business and in the scope of his authority, then the act of the agent is the act of the principal. *Qui facit per alium facit per se.* The solution of this case depends upon the relation existing between Nichols and the plaintiff, at the time the alteration was made. If he was the plaintiff's agent, and the act was within the scope of his authority, then his act must be deemed the act of the plaintiff and the law is with the defendants. If his position was that of a mere stranger to the note, then the law is with the plaintiff. * * *

The appellees further insist that Nichols was the agent of the payee in making the alteration; that he was acting in the line of his agency and under color of his employment; that his wrongful act is im-

putable to his principal. In support of this position appellees' learned counsel say: "This is upon the legal maxim 'whatever a man *sui juris* may do of himself he may do by another,' and, as a correlative, whatever is done by such other in the course of his employment is deemed to be done by the party himself. On this principle the liability of one person for the acts of another who is employed in the capacity of an agent is extended to the wrongful and tortious acts of the latter committed in the line and under color of the agency, although such unlawful acts were not contemplated by the employment, and were done by the agent in good faith and by mistake. In other words, where a principal directs an act to be done by an agent, in a lawful manner, but the agent errs in the mode of executing his authority to the prejudice of another person, the principal will be held responsible." This is a correct statement of the law. The same principles extend to the relations existing between a master and his servant. Thus if the engineer of a railway company negligently run a train of cars over a person who is without fault, the company is liable for the injury caused. The same doctrine is applied to the willful acts and the mistakes of agents and servants, committed by them while acting within the scope of the agency or line of the employment. May v. Bliss, 22 Vt. 477; Luttrell v. Hazen, 3 Sneed (Tenn.) 20; Pennsylvania Co. v. Weddle, 100 Ind. 138; Evansville, etc., R. R. Co. v. McKee, 99 Ind. 519; Crockett v. Calvert, 8 Ind. 127.

At the time Nichols made the alteration of the note, was he the agent or servant of the plaintiff in respect to his duties pertaining to said note? It is averred that he was the traveling salesman, but that he was not a general agent, and had no authority to make settlements or take notes on plaintiff's acccounts; nor was that any part of his duties; that being about to go to Lebanon in the course of his duties as such traveling salesman, the plaintiff instructed him to procure for plaintiff from the defendants a note on account of an indebtedness due from them to the plaintiff. But the averments of the complaint negativing the fact of agency will not control if it appear from all the averments that the legal relation of agency exists. The same person may be a special agent for the same principal in several different matters. Nichols was the agent of the plaintiff to sell goods. He was also its agent to procure the note. We are here concerned with the latter agency only. Did his relation as agent cease when he obtained the note or did it continue until the note was delivered to the plaintiff? If the agency ceased when the note was obtained by him, what relation did he sustain to the plaintiff in the interval of time between the delivery to him and the delivery to plaintiff? This leads to the inquiry: "Who are agents and who are servants?" In the primitive conditions of society the things which were the subjects of sale and trade were few in number. There was little occasion for any one to engage in commercial transactions, and when it did become necessary the business was generally transacted by the

parties to acts in person. But the more general and powerful and many servants who were usually slaves. The servants performed menial and manual services for the master. As civilization advanced the duties which on the principle of economy increased and it became necessary to perform ministerial transactions through the medium of other persons. The relation of principal and agent is the necessary growth or expansion of the relation of master and servant. The same rules that apply to the one generally apply to the other. There is a marked similarity in the legal consequences resulting from the two relations. It is often difficult to distinguish the difference between an agent and a servant. This difficulty is increased by the fact that the same individual often combines in his own person the functions of both agent and servant. Agents are often termed servants and servants are often called agents. The word "servant" was at one time a word of honor. There is, however, in legal contemplation a difference between an agent and a servant. The Romans, to whom we are indebted for many of the principles of agency, in the early stages of their law used the terms *mandatum* (to commit into one's hand or custody to the discretion of another) and *negotium* (to employ another in or to treat concerning purchase in describing this relation). Story, Agency, § 2. Agency, property dealing, relates to commercial or business transactions, while service has reference to menial acts or manual things. Service deals with labor or manual or mechanical assistance. An agent is the more direct representative of the master and clothed with higher powers and under fewer restrictions. Mechem, Agency, § 1. And as

The terms "agent" and "servant" are so frequently used interchangeably in the determination that the reader is apt to confound the one with the other. By doubt, however, and the history of the law bearing on this subject shows that there is a difference between them. Agency is a legal relation wherein by mutual consent one person, called the agent, is authorized to act through the medium of another. Mechem, Agency, § 1. And as

Agency implies an act done with third parties to commercial contracts or dealings between one person and another. When Nichols was engaged in trading with the plaintiffs he was in the employ of the plaintiffs, and he owed to them a duty to perform his duties as clerk and salesman faithfully and honestly. In doing this he owed no duty to the defendant. He ceased to be an agent because he was not employed by the defendant with third parties. He was then a mere servant of the plaintiffs charged with the duty of faithfully carrying out definite orders he was to obey. When Nichols made the alleged false representations he was the servant and not the agent of the plaintiffs. Appellee's learned counsel further contends that if it be true that the contract was made by Nichols as the agent of the plaintiffs, still the plaintiffs can not take advantage thereof. Nichols was guilty of various acts

parties thereto in person. But the strong and powerful had many servants who were usually slaves. The servants performed menial and manual services for the master. As civilization advanced the things which are the subjects of commerce increased, and it became necessary to perform commercial transactions through the medium of other persons. The relation of principal and agent is but an outgrowth or expansion of the relation of master and servant. The same rules that apply to the one generally apply to the other. There is a marked similarity in the legal consequences flowing from the two relations. It is often difficult to distinguish the difference between an agent and a servant. This difficulty is increased by the fact that the same individual often combines in his own person the functions of both agent and servant. Agents are often denominated servants and servants are often called agents. The word "servant" in its broadest meaning includes an agent. There is, however, in legal contemplation a difference between an agent and a servant. The Romans, to whom we are indebted for many of the principles of agency, in the early stages of their laws used the terms *mandatum* (to put into one's hand or confide to the discretion of another) and *negotium* (to transact business or to treat concerning purchases in describing this relation). Story Agency, § 4. Agency, properly speaking, relates to commercial or business transactions, while service has reference to actions upon or concerning things. Service deals with matters of manual or mechanical execution. An agent is the more direct representative of the master and clothed with higher powers and broader discretion than a servant. Mechem Agency, §§ 1 and 2.

The terms "agent" and "servant" are so frequently used interchangeably in the adjudications that the reader is apt to conclude they mean the same thing. We think, however, that the history of the law bearing on this subject, shows that there is a difference between them. Agency in its legal sense always imports commercial dealings between two parties by and through the medium of another. An agent negotiates or treats with third parties in commercial matters for another. When Nichols was engaged in treating with the defendants concerning the note he was an agent. When the note was delivered to him it was in law delivered to the plaintiff, and he ceased to treat or deal with the defendants. All his duties concerning the note then related to the plaintiff. It was his duty to carry and deliver it to the plaintiff. In doing this he owed no duty to the defendants. He ceased to be an agent because he was not required to deal further with third parties. He was then a mere servant of the plaintiff charged with the duty of faithfully carrying and delivering the note to his master. When Nichols made the alteration in the note he was the servant and not the agent of the plaintiff. Appellee's learned counsel further contend, that if it be true that the master is liable for the wrongful and tortious acts of his servant it can make but little difference whether Nichols was agent or servant when

he made the change. Upon what principle is the master liable for the wrongful acts of his servant? This inquiry carries us back to the very dawn of jurisprudence. The modern idea of law is that it consists of those rules of conduct prescribed and enforced by the sovereign power of the state. But as Mr. Justice Stephen truly remarks: "It is not till a very late stage of its history that law is regarded as a series of commands issued by the sovereign power of the state." As a matter of historical fact ancient laws were not commands. They were not issued by political superiors, nor were they enforced by punishment or otherwise. "They were merely customs sanctioned by usage voluntarily observed with that strong devotion to usage which always characterizes uncivilized nations." Vengeance on the part of the person injured is the foundation of all legal redress. The early history of all political societies shows the same system of private revenge and personal redress of injuries. Each person avenged in whatever manner he deemed right the injuries done him. The tribal customs not only sanctioned his doing so, but perhaps required him to do so. If he failed to avenge an injury or wrong he was brought under the ban of public contumely. The spirit of retaliation is deeply rooted in human nature. Retribution in kind is the first impulse of the savage mind on sustaining an injury. "An eye for an eye, a tooth for a tooth; who so sheddeth man's blood by man shall his blood be shed—was the rule of all early and savage communities." If one man killed another, custom permitted and perhaps required that the blood relatives of the deceased should avenge his death by killing the slayer. The Romans were the most civilized of all the ancient peoples. Their laws form the basis of all modern jurisprudence. Yet Mr. Mayle, in speaking of Roman law, well says: "A system of self-redress in the form of private vengeance preceded everywhere the establishment of a regular judicature; the injured person, with his kinsmen, or dependents, made a foray against the wrongdoer, and swept away his cattle and with them perhaps his wife and children, or he threatened him with supernatural penalties by 'fasting' upon him as in the east even at the present day; or finally he reduced his adversary to servitude or took his life." Mayle's Just. Inst. Vol. 1, p. 614. The family or tribe of the person who had committed an offense might escape the vengeance of their adversaries by delivering up or surrendering the offending member. As society slowly and gradually emerged from this depth of barbarism, a custom arose by which the person who inflicted the injury might buy off the vengeance of the injured. If the parties could not agree on the amount to be paid the tribal assembly fixed it. These tribal assemblies met for the purpose of fixing the price of vengeance are the prototypes of modern courts. The idea that society or the state was injured by a wrong inflicted upon one of its members or upon his property was of much later growth. If a man's slave inflicted an injury upon another the injured party was entitled to wreak his venge-

[illegible] the [illegible] cause of the injury. The same principle [illegible] and [illegible] objects. But the reader of [illegible] might [illegible] of the injured person be a matter [illegible] Secondly, were the life or [illegible] to be preserved. This distinction into the history of law may seem inappropriate to the decision of this case. But a knowledge of the history of that branch of law with which any principle is connected, often [illegible] before the true bearings and the limits of its application can be [illegible] ascertained. Principles which have originated from certain cases are sometimes misapplied, simply because there is a similarity in the facts of two different cases, and sometimes the true principle of [illegible] or [illegible] and a reason not intended or explicable [illegible] from a historical standpoint at once [illegible]. The law [illegible] supposed to be the reflection of human reason, and it is manifest [illegible] that when the reason fails the law fails. But [illegible] which [illegible] to certain conditions are often more [illegible]. The law does not always proceed logically, for "the life of the law has not been [illegible] it has been experience." [illegible] Many things which we take for granted have had to be laboriously wrought out or thought out in times passed." Thomas Cooley, J., [illegible]. The principle involved in this case is that of the master's liability for the act of his servant. Let us take a common illustration. The driver of a grocer's cart negligently runs over another in the street, the person injured being without fault. The grocer is liable for the negligence of his servant, the driver. But why or upon what principle? It is sometimes said that the reason for the master's liability in such cases is, his negligence in employing an unskilful servant. If that were really the true reason, the logical result would be that if the master was guilty of no negligence in employing the servant he would not be liable. This however we know does not follow. It is no defence that the master used the greatest care in employing his servants. Again, suppose an engineer or foreman of a railroad company carelessly runs a train of cars over another person, or leaves the company or lashes out his wrongful act at his servants, and thereby is overcome by the company so as to kill another person, and that it is done without the knowledge or consent of the company or against its expressed will or order.

It is difficult to understand this principle of liability unless we approach it from the side of history. It is to realize a survival of the ancient doctrine that the master or owner was liable for the act of his slave and his animals committed by animals in his possession. The ancient idea was that the family of the master, including his slaves, his animals, and all other property, was a unity, and that the servants of the master afforded all of his property also as to any entrance to all the benefits of ownership, the same among the consequences. So any harm injuries caused by his property. He might lose all the [illegible] of the injured person or he might appease a

ance upon the immediate cause of the injury. This same principle extended to animals and inanimate objects. But the master or owner might buy off the vengeance of the injured person by a money consideration and thereby save the life of his slave or injury to his property. This digression into the history of law may seem inappropriate to the decision of this case. But a knowledge of the history of that branch of law with which any principle is connected, is often necessary before the true bearings and the limits of its application can be fully determined. Principles which have originated from certain causes are sometimes misapplied, simply because there is a similarity in the facts of two different cases, and sometimes the true principle is overlooked or forgotten and a new one invented to explain rules which from a historical standpoint are well established. The law is sometimes said to be the perfection of human reason, and it is further said that when the reason fails the law fails. But these expressions when applied to certain conditions, are often mere platitudes. The law does not always proceed logically, for "the life of the law has not been logic; it has been experience. * * * Many things which we take for granted have had to be laboriously wrought out, or thought out in times passed." Holmes Com. L., p. 1. The principle involved in this case is that of the master's liability for the tort of his servant. Let us take a common illustration. The driver of a grocer's cart negligently runs over another in the street, the person injured being without fault. The grocer is liable for the negligence of his servant, the driver. But why or upon what principle? It is sometimes said that the reason for the master's liability in such cases is his negligence in employing an unskilful servant. If this were really the true reason, the logical result would be that if the master was guilty of no negligence in employing the servant he would not be liable. This, however, we know does not follow. It is no defense that the master used the greatest care in employing his servant. Again, suppose an engineer or servant of a railroad company wilfully run a train of cars over another person; we know the company is liable for the wrongful act of its servant, and that it is no excuse for the company to say it did not authorize the act and that it was done without the knowledge or consent of the company, or against its expressed will or order.

It is difficult to understand this principle of liability unless we approach it from the side of history. It is in reality a survival of the ancient doctrine that the master or owner was liable for the act of his slave and for injuries committed by animals in his possession. The ancient idea was that the family of the master, including his slaves, his animals, and all other property, was a unity; and that the personality of the master affected all of his property; that as he was entitled to all the benefits of ownership he must accept the consequences flowing from injuries caused by his property. He might buy off the vengeance of the injured person or he might appease it

by surrendering the injured property to the person aggrieved. In Roman law there was a class of actions known as *noxal* actions, which provided for this vicarious liability. The defendant had the option of surrendering the delinquent instead of paying damages. In ancient times the masses were slaves; in modern times the masses are freemen. When slaves became freemen the master was shorn of his power to surrender the delinquent servant; but he still continues to be liable for the acts of his servant done in the line of employment. This principle of liability originates in slavery and in the power and dominion that the master exercised over the members of his family. But it may be said that as the master has ceased to have any property in his servants, and as he is shorn of his power to surrender a delinquent, the reason for the rule fails, and that the law must fall with the reason, and that this would result in exonerating the master from all liability in all such cases. It is true that the power of surrendering the delinquent has ceased, but it is not true that the personality of the master has ceased to affect his servants. The will of the master dominates any given enterprise. He calls to his aid servants and appliances. The servant surrenders his time and in a measure permits the will of the master to dominate and control his actions. He is the instrument of his master in accomplishing certain ends. The servant is placed in the position and given the opportunity to commit the wrong by the will of the master. In a qualified sense the servant is the representative of the master. Without the controlling, dominating influence of the master's will there is but the remotest probability that the servant would have been placed in the position or given the opportunity to commit the particular wrong. Anciently the liability of the master was not limited by the duties imposed upon his slave. When a servant became a freeman he was no longer a member of the master's family, and he could not properly be said to be the representative of his master except in the line of the employment. Modern jurisprudence properly and justly limits the liability of the master to the acts of his servant done within the scope of the employment. There is still substantial and just grounds for the principle that the master is liable for the wrongful acts of his servant. No liability arises against the master for the wrongful acts of his servant unless the servant has perpetrated an injury either upon the person or property of another. Nichols was the servant of the plaintiff when he made the alteration of the note. But did he inflict any injury upon the property of the defendant? Certainly not. The injury, if any, was inflicted by the servant upon the property of his own master, and not upon the property of the defendants. If appellee's contention be true, Nichols destroyed the plaintiff's note, and no recovery can be had upon it nor upon the original consideration. The principle that the master is liable for the tortious acts of his servant committed in the line of the employment has no ap-

principles in the case of this case, for so it is, have you done the defendant's property."

Our conclusion is that Nichols, when he made the assignment of the note, stood in the relation of a stranger, and that his act was a mere spoliation.

Judges Daniel and Lyon dissented.

Judgment reversed at the cost of the appellee.

Section 3.—Special, General and Universal Agents

WOOD v. McCAIN

1856. Supreme Court of Alabama. 7 Ala. 800.

Writ of error to the circuit court of Talladega.

The defendant in error having recovered a judgment against William Wood and Silas B. Sherman, made the fieri facit returned by mame, and issued a garnishment to be served and served on Sandy Wood, supposed to be debtor of Sherman, among whom was John S. Smith. This garnishee appeared and answered that he was indebted to Sherman for professional services as a physician, rendered in 1840, to the amount, as he understood at sixteen dollars, which was due on the first of January 1841. Some few days previous to the service of the garnishment, the garnishee was informed by Mathew Wood, that he could not consider himself indebted to Sherman any longer, that the books or accounts of the latter had been transferred to him. Wood promised to settle the matter, and the garnishee made no mention of payment.

To each entry at law a notice was issued, requiring Wood to ap-

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

plication to the facts of this case, for no injury was done the defendant's property.[1] * * *

Our conclusion is that Nichols, when he made the alteration of the note, stood in the relation to it of a stranger, and that his act was a mere spoliation.

Judges Davis and Gavin dissented.

Judgment reversed at the cost of the appellees.[2]

Section 3.—Special, General and Universal Agents.

WOOD v. McCAIN.

1845. Supreme Court of Alabama. 7 Ala. 800.

Writ of error to the circuit court of Talledega.

The defendant in error having recovered a judgment against William Revis and Elisha B. Stedman, made the affidavit required by statute, and caused a garnishment to be issued and served on sundry persons supposed to be debtors of Stedman, among whom was John S. Smith. This garnishee appeared and answered that he was indebted to Stedman for professional services as a physician, rendered in 1840, to the amount, as he understood, of ninety-six dollars, which was due on the first of January, 1841. Some few days previous to the service of the garnishment, the garnishee was informed by Mathew Wood, that he need not consider himself Stedman's debtor any longer, that the books or accounts of the latter had been transferred to him. Wood produced no written transfer, and the garnishee made no promise of payment.

In conformity to law, a notice was issued, requiring Wood to ap-

[1] A portion of the opinion is omitted.

[2] "The first sort of servants, therefore, acknowledged by the laws of England, are *menial servants;* so called from being *intra moenia,* or domestics. * * *

"Another species of servants are called *apprentices* (from *apprendre,* to learn), and are usually bound for a term of years, by deed indented or indentures, to serve their masters, and be maintained and instructed by them. * * *

"A third species of servants are *labourers,* who are only hired by the day or the week, and do not live *intra moenia,* as part of the family. * * *

"There is yet a fourth species of servants, if they may be so called, being rather in a superior, a ministerial, capacity; such as *stewards, factors,* and bailiffs." 1 Bl. Com., Chap. XIV, 425, 426, 427. See also 1 Bl. Com. (Hammond's edition) 719n.

See further, on the distinction between agent and servant, Holland's Jurisprudence (9th ed.) 115; 2 Kent Com. (12th ed.) 260, note 1; article, "Responsibility for Tortious Acts," by John H. Wigmore, 7 Harv. Law Rev. 383, 393n.

Regarding the origin of this maxim, see 1 Bl. Com. (Hammond's edition) 720, 728, 730.

pear and contest with the plaintiff, the right to the money owing by the garnishee. Wood appeared, and an issue was made up and submitted to a jury for the trial of that question, who returned a verdict for the plaintiff, and judgment was rendered accordingly. From a bill of exceptions sealed at the trial of the facts of the case, and the ruling of the court thereupon, may be thus briefly stated, viz.: some time before the garnishment issued, Stedman left the state on a visit, having first made Revis his agent by mere verbal appointment, with a general authority to transact all business for him in this state; he left with his agent his books and accounts for medical services (including the account of the garnishee) for settlement. Wood was informed that the plaintiff intended to garnishee the debtors of Stedman, and being a surety of the latter in a promissory note for one thousand dollars, discounted by the State Bank, immediately applied to Revis for indemnity against the consequences of his suretyship. Accordingly, on the 26th January, 1841, Revis executed a deed in Stedman's name, transferring the books and accounts of his principal to Wood, and then delivered the same to the assignee, who forthwith notified the garnishee of the fact and instructed him to pay what he owed to him (assignee), or his order.

The deed of assignment was rejected as evidence, because there was no written authority to execute it. About March, 1841, Stedman returned to the state, and on being informed of the transfer and delivery of the books and accounts to Wood, forthwith ratified the same.

The court charged the jury that it was not competent for Revis to make the transfer of the books and accounts, as he had done, and that the ratification did not legalize it.

Collier, C. J.—The precise language employed in the bill of exceptions, is this: "Stedman visited North Carolina and left William A. Revis, his general agent, or agent generally (said Revis having no written authority), to transact his business in this state; that he delivered up his books and accounts for medical services to said agent (including the account against garnishee) for settlement, and that said agency was advertised and generally known in the neighborhood."

It is supposed by the counsel for the plaintiff in error that, as Revis was the general agent of his principal, it must be presumed he was authorized to make the assignment in question. This conclusion is by no means a necessary sequence from the premises. General are clearly distinguishable from universal agents, that is, from such as may be appointed to do all acts which the principal can personally do, and which he may lawfully delegate the power to another to do. "Such a universal agency may potentially exist; but it must be of the very rarest occurrence. And, indeed, it is difficult," says Mr. Justice Story, "to conceive of the existence of such an agency, inasmuch as it would be to make such an agent the complete master, not merely

dux facti, but *dominus rerum,* the complete disposer of all the rights and property of the principal." Such an unusual authority will never be inferred from any general expressions, however broad, but the law will restrain them to the particular business of the party, in respect to which, it is presumed, his intention to delegate the authority was principally directed. Thus, if a merchant, in view of his temporary absence, should delegate to an agent his full and entire authority to sell his personal property, to buy any property for him, or on his account, or to make any contracts, or to do any other acts whatsoever which he could do if personally present—these general terms would be limited to buying or selling, connected with his ordinary business as a merchant; and, without some more specific designation, would not be construed to apply to a sale of his household furniture, or library, or the utensils, provisions and other necessaries used in his family. Story on Agency, 20, 21.

The difference between a general and special agent is said to be this: The former is appointed to act in the affairs of his principal generally, and the latter to act concerning some particular object. In the former case, the principal will be found by the acts of his agent, within the scope of the general authority conferred on him, although those acts are violative of his private instructions and directions. In the latter case, if the agent exceeds the special authority conferred on him, the principal is not bound by his acts. Story on Agency, 114; Paley on Agency, 199; Munn v. Commission Co., 15 Johns. 44, 54 (8 Am. Dec. 219). It is laid down that an agent employed to buy has no authority to sell, and vice versa. Story on Agency, 81, 82. So an agency for the purpose of accepting or indorsing bills, or notes, does not authorize the agent to purchase or sell goods for his principal. *Id.* 84. And an authority to take a bond does not in itself embrace the power to receive the money due thereon. *Id.* 88. Nor has an agent, for the purpose of receiving a debt, the power, ordinarily, to receive it in anything else than money, and then only when it is matured. *Id.* 88, 89.

Where one is authorized generally to sign promissory notes for the debts of the principal, the authority cannot be implied to give notes to pay the debts of strangers, or to pledge the credit of the principal as a surety, for goods which were not bought for him and which never came to his use. Odiorne v. Maxey, 13 Mass. 181; Wallace v. Branch Bank at Mobile, 1 Ala. 565. In Rossiter v. Rossiter, 8 Wend. 494 (24 Am. Dec. 62), it was held that a power of attorney, to collect debts, to execute deeds of lands, to accomplish a complete adjustment of all the concerns of the constituent in a particular place, and to do all other acts which the constituent could do in person, does not authorize the giving of a note by the attorney in the name of the principal. Further, that the general words must be construed with reference to the matter specially mentioned, and that the authority to make a complete adjustment, etc., did not authorize the

giving of a note on the purchase of property. So it has been adjudged that a power of attorney "to ask, demand, sue for, recover and receive all such sum or sums of money, debts, dues, accounts, and other demands whatsoever, which are, or shall be due, owing, payable, and belonging to us, or detained from us in any manner or ways or means whatsoever, etc.," does not authorize the attorney to compound for, receive and release a sum of money which is not due and payable. Hefferman v. Adams, 7 Watts 716.

In the case at bar, the general words are, "to transact his (the principal's) business in this state;" but as it respects the books and accounts for medical services rendered by Stedman, these words are restricted by declaring that they were delivered to the agent "for settlement." By this we are to understand that Revis was to collect, or, it may be, otherwise settle these demands with the persons from whom they were due. It would require a most unwarrantable extension of terms to hold that they conferred the power upon the agent to assign the books and accounts to a surety of his constituent for his indemnity. The citations we have made upon this point are pertinent, and most satisfactorily show that the assignment in question was not authorized by the power previously given.[1] * * * Without adding more, the result is that the judgment must be affirmed.[2]

[1] A portion of the opinion is omitted.

[2] For further cases treating of special and general agents, see Chap. V, § 1.

"Authorities by letters of attorney are either general or special; thus a letter of attorney may be to sue in *omnibus causis motis et movendis,* or to defend a particular suit." Holt, C. J., in Parker v. Kett, 1 Salk. 95, 96.

CHAPTER II

CAPACITY OF PARTIES

Section 1.—Who can be Principal

FONDA AND HOAG v. VAN HORNE.

1836. SUPREME COURT OF JUDICATURE OF NEW YORK.
15 Wend. (N. Y.) 631.

Error from Montgomery common pleas. Emily Van Horne, an infant, by her next friend, brought an action of replevin against Fonda and Hoag for the taking of two cows and a calf. A. Van Horne, the father of the plaintiff, testified that with the plaintiff's consent he had sold a cow belonging to her and with the proceeds purchased for her another cow, which was one of the cows described in the declaration. The trial court in charging the jury left to them the question whether A. Van Horne acted as the agent of the plaintiff. The defendants excepted to the charge.

Nelson, J.[1] * * * The only difficulty in the case is in relation to the cow which Van Horne purchased of Cunningham and gave to the plaintiff in the place of the one he had previously sold. If this must be regarded as a gift on the part of the father, then as he was insolvent at the time, the daughter acquired no title as against his creditors; and if it were sale instead of a gift by the father, it would be prima facie fraudulent as against creditors, because he still retained the possession of the property. It was important, therefore, for the plaintiff to connect this transaction with her title to the cow that was given to her by Green. The court charged the jury that if Van Horne merely carried into effect the sale of his daughter by disposing of one cow and procuring for her another as agent, or her agent, then the plaintiff was the true owner, and the defendants were not justified in taking the cow. This was, in effect, instructing the jury, as matter of law, that the plaintiff, though an infant, could constitute her father an agent for the sale of her property. The charge was to this particular exception. The plaintiff could not appoint an agent for the sale of her property. Her sale

[1] A portion of the opinion is omitted.

CHAPTER II.

COMPETENCY OF PARTIES.

Section 1.—Who can be Principal.

FONDA AND HOAG v. VAN HORNE.

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15 Wend. (N. Y.) 631.

ERROR from Montgomery common pleas. Maria Van Horne, an infant, by her next friend, brought an action of replevin against Fonda and Hoag for the taking of two cows and a calf. A. Van Horne, the father of the plaintiff, testified that with the plaintiff's consent he had sold a cow belonging to her and with the proceeds purchased for her another cow, which was one of the cows described in the declaration. The trial court in charging the jury left to them the question whether A. Van Horne acted as the agent of the plaintiff. The defendants excepted to the charge.

BRONSON, J.[1] * * * The only difficulty in the case is in relation to the cow which Van Horne purchased of Easterbrooks and gave to the plaintiff in the place of the one he had previously sold. If this must be regarded as a gift on the part of the father, then, as he was insolvent at the time, the daughter acquired no title as against his creditors; and if it was a sale instead of a gift by the father. it would be *prima facie* fraudulent as against creditors, because he still retained the possession of the property. It was important, therefore, for the plaintiff to connect this transaction with her title to the cow that was given to her by Gross. The court charged the jury that if Van Horne merely carried into effect the will of his daughter by disposing of one cow and procuring for her another as good, as her agent, then the plaintiff was the real owner, and the defendants were not justified in taking the cow. This was, in effect, instructing the jury, as matter of law, that the plaintiff, though an infant, could constitute her father an agent for the sale of her property. The charge was in this particular erroneous. The plaintiff could not appoint an agent for the sale of her property. Her will

[1] A portion of the opinion is omitted.

or consent conferred no authority upon her father. She might treat him as a wrong-doer for making the sale, and the purchaser acquired no title. Notwithstanding the attempted transfer, the cow, which was the gift of Gross, still remained the property of the plaintiff, and she might assert her right to the property in the same manner as though it had been wrongfully taken by a stranger.

What acts of an infant are void, and what are voidable only is a question which has been very much discussed in the books; and several attempts have been made to lay down some general rule which should be applicable to all cases; but with no great success. In Keane v. Boycott, 2 H. Bl. 511, Ld. Ch. J. Eyre laid down the doctrine that where the court could pronounce the contract for the benefit of the infant, as for necessaries it was good; where the court could pronounce it to be to the prejudice of the infant it was void; and in those cases where the benefit or prejudice was uncertain, the contract was voidable only. This may answer well enough as a general rule, but it must be subject to exceptions. It may be for the benefit of an infant to appoint an attorney or agent to sell his lands, but such an act would be clearly void. A conveyance, by the infant himself, of his lands, may be to his prejudice, and yet under certain circumstances the conveyance will be voidable only; and there must be many cases where the act will be void, although it may be uncertain whether it will benefit or prejudice the infant. In Zouch v. Parsons, 3 Burr. 1794, Ld. Mansfield sanctioned the rule laid down by Perkins that "all such gifts, grants or deeds made by infants, which do not take effect by delivery of his land, are void; but all gifts, grants or deeds made by infants, by matter in deed or in writing which do take effect by delivery of his land are voidable, by himself, by his heirs and by those who have his estate." He remarked that the words "which do take effect" were an essential part of the definition, and excluded letters of attorney, or deeds which delegate a mere power and convey no interest. A conveyance by lease and release executed by the infant was held to be voidable only, and that he could not avoid it until he arrived at full age. Although the case of Zouch v. Parsons has been questioned in England, it was approved by this court in Conroe v. Birdsall, 1 Johns. Cas. 127. It was decided in this case that the bond of an infant was not void, but was voidable only. A different rule was laid down by Ld. Coke, who says that an infant will not be bound by a penal obligation, even where it is given for necessaries. Co. Litt., 172a; see, also, 4 T. R. 363, and Baylis v. Dinley, 3 Maule & S. 477. In Swasey v. Vanderheyden, 10 Johns. R. 33, it was held that the negotiable note of an infant given for necessaries, and where that fact appeared upon the face of the instrument, was void. Whether this case and that of Conroe v. Birdsall stand well together need not now be considered.

In relation to personal chattels, the rule seems to be that if an in-

fant give or sell his goods and deliver them with his own hand, the act is voidable only; but if he give or sell goods, and the donee or vendee take them by force of the gift or sale, the act is void, and the infant may bring trespass. 1 Mod. 137; Bac. Abr., Infancy & Age, 1, pl. 3. This distinction was recognized in Roof v. Stafford, 7 Cow. 179. The infant brought trover for a horse which he had sold to the defendant, and the court held that the sale was not absolutely void, on the ground that he had made manual delivery of the goods; and being voidable only, that he could not avoid the sale until he came of age. This judgment was reversed in the court for the correction of errors, 9 Cow. 626, on the ground that it did not appear in point of fact that there had been a manual delivery of the horse. Chancellor Jones, who delivered the opinion of the court, said: "The fact of possession by the vendee would be evidence of a delivery in the case of an adult; but in case of an infant vendor there should be strict proof of personal delivery. An infant cannot make an attorney. The appointment would be void; and there being no proof of actual manual delivery, the contract would seem to be void. The agreement to sell conferred no right upon the vendee to take. The mere agreement of the infant to sell would not protect the vendee against an action of trespass for taking the horse. The taking would be tortious, and in itself a conversion." In the case under consideration the plaintiff did not deliver the property, and the sale by the father was wholly without authority. The infant could not make an attorney or agent to do such an act. The purchaser acquired no title, and the plaintiff may at any time treat him as a tort-feasor and recover the value of the property. The ground on which the court below placed the cause in their charge to the jury is wholly untenable; and it is therefore unnecessary to inquire whether there be any other ground on which the plaintiff can succeed as to the cow (and its offspring) purchased of Easterbrooks. The plaintiff has never ratified the sale made by her father, nor can that be done while she remains an infant. The court below placed her title upon the ground that the father, with her consent and as her agent, had made an exchange of one animal for another, and that this was a lawful act. But her consent conferred no authority, and the father could not act as her agent. She has her remedy for the unauthorized sale; and that transaction can have no legal connection with the subsequent purchase of two cows from Easterbrooks. If she acquired any right to one of those animals, it must be on the ground either of a gift or a sale to her by the father; and before she can recover, the validity of that act must be passed upon by a jury. But she can never recover this animal without making a profit by her incapacity to contract. She has an undoubted right of action for the cow given to her by Gross, and if she may also recover the one given in exchange by her father, she may have double satisfaction, when

in law there has been but one injury. It is, however, enough for the present that the court below erred in its charge to the jury.[2]

Judgment reversed.

WHITNEY v. DUTCH.

1817. Supreme Court of Massachusetts. 14 Mass. 457.

Assumpsit on a promissory note made by the defendants to the plaintiffs. The defendant, Dutch, was defaulted. Green, among other things, pleaded the defense of infancy, to which plaintiffs replied a ratification.

Dutch and Green, as the evidence disclosed, were partners. The note in suit was signed by Dutch, using the firm name and style of the firm of Dutch and Green.

It was contended at the trial and in the supreme court that Green never legally executed the note, it being void as to him. Dutch signed it for himself and for Green, but it was not in the power of Green to confer such authority; that an infant cannot bind himself by appointing an attorney, or agent, such appointment being absolutely void and incapable of ratification. The opinion of the court was delivered by

Parker, C. J. (After disposing of another question.) But the other point made in the defense is more difficult, and presents a question new to us all. This is, that the note, being signed by Dutch for Green, was void in regard to Green; because he was not capable of communicating authority to Dutch to contract for him; and that, being void, it is not the subject of a subsequent ratification.

No such question appears to have occurred in our courts, nor in those of England, or of the neighboring states. Partnerships have not been uncommon between adults and infants; and simple contracts, signed by one for both, undoubtedly have often been made.

It is unfavorable to the principle contended for by the counsel for Green that no such case has been found; for this silence of the books authorizes a presumption that no distinction has been recognized between acts of this kind done by the infant himself and those done for him by another. We must, however, examine the principles by which the contracts of infants are governed and see if, by any analogy to settled cases, the present defense can be maintained.

It is admitted, generally, that a contract made by an infant, although not for necessaries, is only voidable; and that an express adoption of it, after he comes of age, will make it valid from its date.

[2] *Accord:* Doe v. Roberts, 16 M. & W. 778; Trueblood v. Trueblood, 8 Ind. 195; Ware v. Cartledge, 24 Ala. 622.

In Zouch v. Parsons, 3 Burr. 1794, Lord Mansfield said that an infant's power of attorney was void. See also Knox v. Flack, 22 Pa. St. 337.

Nor does the law require that he shall be sued, as upon the new promise; but gives life and validity to the old one, after it is thus assented to. But it is urged that this doctrine applies only to those contracts which are made by the infant personally; and that the delegation of power by him to another of full age, to act for him, is utterly void; and that no contract, made in virtue of such delegation, can subsist, so as to be made good by subsequent agreement or ratification.

If we confine ourselves to the letter of the authorities, it would seem that this doctrine is correct; for we find that, in the distinctions made in the books between the void and voidable acts of an infant, a power of attorney is generally selected, by way of example, as an act absolutely void, unless it be made to enable the attorney to do some act for the benefit of the infant, such as a power of attorney to receive seisin, in order to complete his title to an estate.

The books are not very clear upon this subject. All of them admit a distinction between void and voidable acts; and yet disagree with respect to the acts to be classed under either of those heads. One result, however, in which they all appear to agree is stated by Lord Mansfield in the case of Zouch v. Parsons, cited in the argument, viz., that whenever the act done may be for the benefit of the infant, it shall not be considered void; but that he shall have his election, when he comes of age, to affirm or avoid it; and this is the only clear and definite proposition which can be extracted from the authorities.

The application of this principle is not, however, free from difficulty; for, when a note or other simple contract is made by an infant himself, it may be made good by his assent, without any inquiry whether it was for his benefit or to his prejudice. For, if he had made a bad bargain in a purchase of goods, and given his promissory note for the price, and, when he came of age, had agreed to pay the note, he would be bound by this agreement, although he might have been ruined by the purchase. Perhaps it may be assumed, as a principle, that all simple contracts by infants which are not founded on an illegal consideration are strictly not void, but only voidable, and may be made good by ratification. They remain a legal substratum for a future assent, until avoided by the infant; and if, instead of avoiding, he confirm them, when he has a legal capacity to make a contract, they are in all respects like contracts made by adults.

With respect to contracts under seal also, they are in legal force as contracts until they are avoided by plea. Whether they can, in all cases, as it is clear they can in some, such as leases, be ratified, so as to prevent the operation of a plea of infancy, except by deed, need not now be decided. A deed of land by an infant having the title would undoubtedly convey a seisin; and the grantee would hold his

title under it, until the infant, or some one under him, should by entry or action avoid it.

Perhaps it cannot be contended, against the current of authorities, that an act done by another for an infant, which act must necessarily be done by letter of attorney under seal, is not absolutely void; although no satisfactory reason can be assigned for such a position. But as this is a point of strict law, somewhat incongruous with the general rules affecting the contracts of infants, it is not necessary nor reasonable to draw inferences which may be repugnant to the principles of justice, which ought to regulate contracts between man and man.

The object of the law in disabling infants from binding themselves is to prevent their being imposed upon and injured by the crafty and designing. This object is in no degree frustrated by giving full operation to their contracts if, after having revised them at mature age, they shall voluntarily and deliberately ratify and confirm them. It is enough that they may shake off promises, and other contracts, made upon valuable consideration, if they see fit to do it, when called upon to perform them. To give them still another opportunity to retract, after they have been induced, by love of justice and a sense of reputation, to make valid what was before defective, will be to invite them to break their word and violate their engagements.

If it be true that all simple contracts made by infants are only voidable, the inquiry in this case should be, whether the facts stated furnish an exception to this general rule; or whether the contract now sued is in any sense different from a simple contract.

The only ground for the supposed exception is, that the note declared on was not signed by the infant himself, but by Dutch, claiming authority to sign his name as a copartner. If the authority required a letter of attorney under seal, the exception would be supported by the authorities which have been alluded to.

But it is well known that copartners may, and generally do, undertake to bind each other, without any express authority whatever. Indeed, the authority to do so results from the nature and legal qualities of copartnership. And without any such union of interests, one man may have authority to bind another by note or bill of exchange, by oral, or even by implied authority. The case of a deed, therefore, is entirely out of the question; so that the defendant does not bring himself within the letter of the authorities, and certainly not within the reason on which they are founded. Then, upon principle, what difference can there be between the ratification of a contract made by the infant himself and one made by another acting under a parol authority from him? And why may not the ratification apply to the authority as well as to the contract made under it?

It may be said that minors may be exposed, if they may delegate power over their property or credit to another. But they will be as

much exposed by the power to make such contracts themselves, and more, for the person delegated will generally have more experience in business than the minor. And it is a sufficient security against the danger from both these sources that infants cannot be prejudiced; for the contracts are in neither case binding, unless, when arrived at legal competency, they voluntarily and deliberately give effect to the contract so made. And in such case justice requires that they should be compelled to perform them.

Upon these principles, we are satisfied with the verdict of the jury, and are confident that no principles of law or justice are opposed by confirming it.

Judgment on the verdict.[1]

MOTT v. SMITH.

1860. Supreme Court of California. 16 Cal. 534.

Field, C. J.—The deeds purporting to be executed by the witness, under the alleged power, were upon their face mere nullities. A married woman cannot invest another with a power to sell any interest which she may possess in real estate, in the absence of any statute to that effect, and there is no such statute in this state. To the efficacy of a conveyance by a married woman, it is essential that she join with her husband in its execution, and state, on a private examination at the time, separate and apart from him, and without his hearing, that she executed the same freely, without fear of him or compulsion, or under influence from him, and that she does not wish to retract its execution. This private examination—this determination of the will as to the retraction of the execution—are not matters which can be delegated to another. Besides, the power only authorizes a sale, that is, a transfer for a valuable consideration, which was evidently intended to be a moneyed consideration. It does not authorize a conveyance from motives of love and affection. The conveyances, therefore, carry on their face the evidence of their own nullity. (Dupont v. Wertheman, 10 Cal. 355.) Again, it does not appear that Patterson or wife ever possessed or claimed any interest in any of the lands covered by the grant to Gutieras, or the

[1] *Accord:* Hastings v. Dollarhide, 24 Cal. 195; Hardy v. Waters, 38 Me. 450. "But this last-named case [Hardy v. Waters] was, we think, correctly decided, and it stamps as inaccurate and unsound all dicta or decisions (if such there be) which hold all acts done and contracts executed by an infant through the intervention of an agent void, and on the contrary relegates the appointment of agents (for certain purposes at least) by them to the class of voidable contracts to be disposed of by the rules applicable to that class." Barrows, J., in Towle v. Dresser, 73 Me. 252, 257.

See discussion of Coursolle v. Weyerhauser, 69 Minn. 328, holding that an infant's appointment of agent is voidable, in 11 Harv. Law Rev. 340.

patent to Johnson, or had any such land in contemplation when the power was executed. The title by which the plaintiffs claim in the present action is independent of any conveyances from them. If they ever, in fact, possessed any interest in the premises, they still retain it against any possible interference with their rights from the action of their attorney, as disclosed by the conveyances in question.[1] * * *

KENTON INSURANCE COMPANY v. McCLELLAN.

1880. Supreme Court of Michigan. 43 Mich. 564.

Assumpsit. Plaintiff brings error.

Campbell, J.—Plaintiff sued defendant, who is a married woman, upon a promissory note made by her and payable to the order of plaintiff for $290.42, dated September 4, 1877, and payable at nine months. She defends on the ground that the note was not given on such a consideration as binds her.

A preliminary objection that this defense was waived by failure to file affidavit under rule 79 has no force. Defendant does not dispute the execution of the note. Her defense is want of capacity to make it, except on a particular consideration.

It has been held uniformly by this court that our statutes do not authorize a married woman to become personally liable on an executory promise except concerning her separate estate. A note given for any other consideration is void. De Vries v. Conklin, 22 Mich. 255; West v. Laraway, 28 Mich. 464; Emery v. Lord, 26 Mich. 431; Ross v. Walker, 31 Mich. 120; Jenne v. Marble, 37 Mich. 319; Kitchell v. Mudgetl, 37 Mich. 81; Carley v. Fox, 38 Mich. 387; Johnson v. Sutherland, 39 Mich. 579; Russel v. People's Savings Bank, 39 Mich. 671; Gants v. Toles, 40 Mich. 725.

It has also been settled that there is never any presumption of validity of such an undertaking, whether negotiable or not, and that proof must always be given of such a consideration as will bind her. We think that the rule must apply whether value received is expressed or not, because the power is not general but statutory, and cannot be extended beyond the constitutional and statutory limits. See Powers v. Russel, 26 Mich. 179; Emery v. Lord, 26 Mich. 431; West v. Laraway, 28 Mich. 464; Johnson v. Sutherland, 39 Mich. 579.

It was held in the latter case that a *bona fide* holder was no better off than any one else, as against the disability of coverture. But, inasmuch as plaintiff here is the original payee, it is not a *bona fide* holder. Rickle v. Dow, 39 Mich. 91.

[1] A portion of the opinion is omitted.

The evidence proved without contradiction that one note was given by defendant to her son Joseph Parker, to use to provide for a family of a man of Wright & Parker, in which he was a partner. That he gave it to one Jackson, plaintiff's agent and took back from him an assignment to defendant from plaintiff of this debt, which had already been executed by plaintiff and was in defendant's hands. Defendant never knew of this and never authorized it.

A married woman cannot give away or sell her power which she does not possess herself, and cannot therefore convey any estate she could not herself convey. Nor can she [illegible] her property. Whether [illegible] from some income she had power [illegible] in the present case there is no evidence tending to show that any such income was made, or was plaintiff or his agent acted or entered upon the supposed authority, or in consequence of the [illegible]. The record is [illegible] and the plaintiff must [illegible] was a mere form. There is no evidence to any [illegible] appeared to have been made at the [illegible] It does appear by a [illegible] of an instrument which had already been executed, in exchange for defendant's paper. It does not [illegible] that the [illegible] at the time. It was made at all [illegible] is no pretense that any earlier [illegible] was [illegible] or [illegible] defendant's behalf.

[illegible] the case was [illegible] therefore a [illegible] of [illegible] was made [illegible] and the court erred [illegible] a verdict for defendant.

[illegible] of error to affirm [illegible]

The other [illegible] concurred.

PORTER v. HALEY and PAYNE.

1877 — supreme court of [illegible] — 55 Miss. 74

[illegible] to [illegible]. The plaintiff has judgment below. The defendant brings error.

[illegible] C. J.—[illegible] a note executed by [illegible] to [illegible] of a suit in chancery brought against Mrs. Porter and her husband, involving her claim to real estate claimed by her as her separate property.

The real question in the abstract, is whether a married woman can make a separate estate, or is entitled [illegible] to use a [illegible] compensation, for the release of a [illegible] to [illegible] separate real estate.

There can be no doubt that at present it would be [illegible] to [illegible] her beneficial [illegible] as contended [illegible]

[illegible] Miss. 4 Otto (14 S. C.) 74.

The evidence showed without contradiction that this note was given by defendant to her son, August Kuenzel, to use as security for a debt of a firm of Wright & Kuenzel, in which he was a partner. That he gave it to one Jackson, plaintiff's agent, and took back from him an assignment to defendant from plaintiff of that debt, which had already been executed by plaintiff and was in Jackson's hands. Defendant never knew of this and never authorized it.

A married woman cannot give to an agent any power which she does not possess herself, and cannot, therefore, appoint any agents that could bind her except concerning her property. Persons dealing with them must inquire into their powers. In the present case there is no evidence tending to show that any such inquiry was made, or that plaintiff or its agent acted in reliance upon any supposed authority, or in ignorance of the facts. The record is not inconsistent with the possibility that Jackson and the plaintiff made the assignment as a mere sham. There is no evidence of any bargain for an assignment supposed to have been made on the credit of defendant. All that appears is a delivery of an assignment which had already been executed, in exchange for defendant's paper. It does not appear that the bargain was made at this time, if it was made at all, and there is no pretense that any earlier bargain or negotiation was made really or ostensibly on defendant's behalf.

When the case was closed, therefore, no cause of action was made out, and the court properly directed a verdict for defendant.

The judgment must be affirmed with costs.

The other justices concurred.[1]

PORTER v. HALEY and STONE.

1877. Supreme Court of Mississippi. 55 Miss. 66.

Action for services. The plaintiff has judgment below. The defendant brings error.

Simrall, C. J.—Haley & Stone rendered the services as solicitors, in the defense of a suit in chancery, brought against Mrs. Porter and her husband, involving her right to real estate claimed by her as separate property.

So that the question, in the abstract, is whether a married woman (who owns a separate estate, as is agreed) can contract to pay a solicitor compensation for the defense of a suit brought to affect her rights to separate real estate.

There can be no doubt that if property is settled to her separate use, so as to constitute her the beneficial owner of an equitable estate,

[1] See Phillips v. Burr, 4 Duer (N. Y.) 113.

she could charge that estate with such liability, enforceable against it in a court of equity. But it is argued that the property attempted to be subjected in this suit was a statutory, legal estate, and that the power of Mrs. Porter over it, and her capacity to bind it, was governed altogether by the statute—that we must look alone to it for her authority to make the contract. The premise is undoubtedly correct.

The statute, section 1778, of the Code of 1871, continues to a woman, after marriage, every species and description of property owned at the time of the marriage, as her separate estate. So, also, acquisitions after marriage, including the fruits of her personal service. And money recovered for damages to her person shall constitute personal estate. By section 1779, the rents, issues and income of the separate estate shall accrue and inure to the wife, and shall not be taken for the husband's debts. Section 1780 allows the wife to rent her land, make contracts for the use thereof, loan her money, take securities therefor in her own name, and employ it in trade or business.

It would be vain and nugatory to confer these large property interests and rights on married women, and deny them free access to the courts for their assertion and defense. If a wife may take to herself damages recovered for a personal injury, the law does not intend that her property may be despoiled and no compensation enforced against the wrong-doer. If she is disseized of her land, may she not employ the usual and necessary aids allowed other land-owners to regain possession, and recover damages equivalent to the rents and profits of which she has been deprived?

It is admitted that express authority is not given by statute to employ counsel and engage to pay fees, but she may sue, alone or jointly with her husband, "for the recovery of her property or rights;" and she may be sued "on all contracts, or other matters, for which her individual property is liable." Code 1871, § 1783. She may execute a bond necessary in any proceeding, either at law or in equity, to establish or enforce her rights, and the same shall be binding, etc. Code 1871, § 1781.

She may contract for work and labor for the use and benefit or improvement of her separate estate. Code 1871, § 1780.

This legislation implies that the courts shall be open to the wife to sue both for the recovery of her property or "rights." The principal power carries with it all incidents necessary to its efficiency. So she may be sued on her contracts, and other matters; the power to *defend* a suit is necessarily implied. It would be folly to say that she could not consult and employ counsel, if it were usual, proper and necessary.

Since she may be impleaded in the courts in matters affecting her separate estate, she must be esteemed competent to avail of all the aids and facilities open to suitors generally. If she may loan her

money and take securities therefor, without further provision of law, she could sue on the note or bond, or foreclose the mortgage, and could engage an attorney, and contract to pay for that service. By express statute, she may make any bond incident to judicial proceedings.

It was held in New York, in Freeking v. Bolland, 53 N. Y. 422-425, that under a statute allowing a married woman to carry on any trade or business, etc., the power to make contracts relating to her business was incidental to her power of conducting it. Adams v. Nonness, 12 Barb. 326; Chapman v. Foster, 6 Allen 136.

We have been referred, by counsel for the appellant, to several cases supposed to sustain his view. Putnam v. Tennyson, 50 Ind. 459, illustrates the class. There the effort was to hold the wife bound for attorney's fees to prosecute a suit for divorce. Such a contract fell under the common-law rule, and was not affected by the statute. It had no relation to the separate estate or property interests of the wife.

Judgment affirmed.[1]

WORTMAN v. PRICE.

1868. Supreme Court of Illinois. 47 Ill. 22.

Appeal from circuit court of McLean county. The facts in the case are substantially set forth in the opinion of the court.

Mr. Justice Lawrence delivered the opinion of the court.

This was a trial of the right of property, in which Mrs. Henrietta C. Price claimed the ownership of about seventy hogs, levied upon under an execution against her husband. She testified that her husband's father gave her, in 1866, different sums, amounting in all to $2,960, and a piece of land, which she sold at $800, and that her husband had been for a year acting as her agent, in buying and shipping grain and stock, with this money. The partner of Mr. Price was produced as a witness, and he testified that he and Price formed a partnership for dealing in grain and stock in November, 1866; that he knew nothing of Mrs. Price in the business, and was not in partnership with her; that the firm sometimes did business to the amount of $4,000 or $5,000 per week; that they made money, and that he did not know where the money came from that Price put into the business. The partnership was dissolved before the hogs in controversy had been levied on, and he had sold a part of them to Price. The

[1] In Dorrance v. Scott, 3 Whar. (Pa.) 308, it was held that a warrant of attorney given by a married woman, joined by her husband, for the sale of her separate estate, was void.

In Vail v. Meyer, 71 Ind. 159, it was held that a married woman may contract, through an agent, for the improvement of her property.

case was submitted to the court, without a jury, and on this state of facts, the finding and judgment were for the claimant of the property.

We think the finding was erroneous. It is urged that although such an arrangement could not have been sustained prior to the law of 1861, known as the married woman's act, it is legalized by that law. Under that law, the husband can undoubtedly act as the agent of his wife, for the purpose of managing her separate property, but it must be an actual and *bona fide* agency, and not an arrangement by which, under color of an agency kept concealed from the public, the husband is to enter into trade with capital furnished by the wife, carry on business in his own name, precisely as he would do with his own money, and then claim, as against creditors, that all the property bought and sold by him in the course of his business, is the property of his wife. In the case before us, it does not appear that there was any arrangement between the husband and wife for his compensation, although he devoted all his time and energy to the business which he claims to have been conducting as her agent. The profits of this business arose in part from the capital employed and in part from his time and skill, yet there was no arrangement as to their division. Although the act of 1861 authorizes the wife to hold personal property, and under that law she may employ her husband as agent to manage it, yet it does not authorize her to receive, to the exclusion of creditors, the entire fruits of his time, skill and industry, and it must not be so construed as to invite fraud.

This transaction can only be regarded, so far as concerns creditors, as a loan of the wife's money to her husband, by means of which he engaged in trade. Such would have been its character if the money had come from a third person, and it must be so regarded as between the husband and wife. It has been decided in other states having a married woman's law, similar, in most respects, to our own, that the wife cannot, by virtue of this law, engage in trade. Freeman v. Aeser, 5 Duer 476; Sherman v. Elder, 24 N. Y. 383; Wooster v. Northrup, 5 Wis. 245; Glover v. Alcott, 11 Mich. 471; Gage v. Dauchy, 28 Barb. 622; Keeney v. Good, 21 Pa. St. 349; Hallowell v. Horter, 35 Pa. St. 375. Whether she can do so in her own name, and manage the business herself, without the aid or interference of her husband, is a question not involved in the present case, and one we do not decide. But we have no hesitation in saying that if she advances capital to her husband, with which he engages in trade, such capital and its fruits in the business will be subject to the husband's debts, even though he may claim to be acting as his wife's agent, and doing business in her name. A different rule would lead to the grossest fraud. What was said in Brownell v. Dixon, 37 Ill. 197, in regard to the power of the husband to act as agent for his wife, simply means that he may act as her agent for a particular transaction, or generally, for the control of her property or the invest-

ment of her funds. He may lease her property and collect the rents, or invest her money, or change the character of her investments, if authorized by her, and he may do this without subjecting her property to his debts. But we did not say, nor expect to be understood as saying, that she could make him her agent, for the purpose of engaging in trade, to be managed by him, and to which all his time and energy might be devoted, and that the property embarked in such trade, and its profits, would be beyond the reach of his creditors. Such is not the law. The judgment must be reversed.

Judgment reversed.[1]

DEXTER v. HALL.

1872. Supreme Court of the United States. 82 U. S. 9.

In error to the Circuit Court of the United States for the District of California.

This was an action of ejectment commenced in the court below by the defendant in error, to recover a certain lot of land in the city of San Francisco. The plaintiffs below claimed as the heirs of one John Hall. The defendants set up a power of attorney executed by the said Hall to one James W. Harris, substitution by Harris of David B. Rising, and mesne conveyances from Rising. To avoid this title, the plaintiffs gave evidence to show the insanity of John Hall at the time he executed the power of attorney to Harris. The defendants also relied on the statute of limitations. The widow of John Hall, who was one of the original plaintiffs, died during the pendency of the suit, and it is now prosecuted by the children alone. Judgment was rendered in the court below for the plaintiffs. All the defendants, except Dexter, paid the heirs for their respective titles, and the suit was dismissed as to them. Dexter sued out this writ of error, relying upon exceptions to the charge of the judge, and also to the admission and refusal of certain evidence.

The nature of these exceptions appears in the opinion.

Strong, J.—The prominent question in this case is, whether a power of attorney executed by a lunatic is void, or whether it is only voidable. The circuit court instructed the jury that a lunatic or insane person, being of unsound mind, is incapable of executing a contract, deed, power of attorney, or other instrument requiring volition and understanding, and that a power of attorney executed by an insane person, or one of unsound mind, is absolutely void. To this instruction the defendant below excepted, and he has now assigned it for error.

[1] *Accord:* Weisbrod v. Chicago & Northwestern Ry. Co., 18 Wis. 35. See also Paine v. Farr, 118 Mass. 74.

Looking at the subject in the light of reason, it is difficult to perceive how one incapable of understanding and of acting in the ordinary affairs of life, can make an instrument, the efficacy of which consists in the fact that it expresses his intention, or more properly his mental conclusions. The fundamental idea of a contract is that it requires the assent of two minds. But a lunatic, or a person *non compos mentis,* has nothing which the law recognizes as a mind, and it would seem, therefore, upon principle, that he cannot make a contract which may have any efficacy as such. He is not amenable to the criminal laws, because he is incapable of discriminating between that which is right and that which is wrong. The government does not hold him responsible for acts injurious to itself. Why, then, should one who has obtained from him that which purports to be a contract be permitted to hold him bound by its provisions, even until he may choose to avoid it? If this may be, efficacy is given to a form to which there has been no mental assent. A contract is made without an agreement of minds. And as it plainly requires the possession and exercise of reason quite as much to avoid a contract as to make it, the contract of a person without mind has the same effect as it would have had he been in full possession of ordinary understanding. While he continues insane he cannot avoid it; and if, therefore, it is operative until avoided, the law affords a lunatic no protection against himself. Yet a lunatic, equally with an infant, is confessedly under the protection of courts of law as well as courts of equity. The contracts of the latter, it is true, are generally held to be only voidable (his power of attorney being an exception). Unlike a lunatic, he is not destitute of reason. He has a mind, but it is immature, insufficient to justify his assuming a binding obligation. And he may deny or avoid his contract at any time, either during his minority or after he comes of age. This is for him a sufficient protection. But as a lunatic cannot avoid a contract, for want of mental capacity, he has no protection if his contract is only voidable.

It must be admitted, however, that there are decisions which have treated deeds and conveyances of idiots and lunatics as merely voidable, and not void. In Beverly's Case, 4 Co. 123, b, which was a bill for relief against a bond made by Snow, a lunatic, it was resolved that every deed, feoffment or grant, which any man *"non compos mentis"* makes, is avoidable, and yet shall not be avoided by himself, because it is a maxim of law that no man of full age shall be, in any plea to be pleaded by him, received by the law to stultify himself and disable his own person. A second reason given for the rule was, "because when he recovers his memory he cannot know what he did when he was *non compos mentis.*" Neither of these reasons are now accepted, and the maxim no longer exists. There were other things ruled in Beverly's case, among which were these: That the disability of a lunatic is personal, extending only to the party him-

self, except that it extends to privies in tenure, as lord by escheat, and privies in estate, as tenant in tail; but that privies in blood, as heirs, or privies in representation, as executors or administrators, might show the disability of the ancestor, or testator, or intestate. It was also resolved that acts done in a court of record were not avoidable even in equity. Lord Coke, in commenting on the case, remarked that "As to others there is a great difference between an estate made in person and by attorney; for if an idiot, or *non compos mentis,* makes a feoffment in fee in person, and dies, his heir within age, he shall not be in ward, or if he dies without heir the land shall not escheat; * * * but if the feoffment is made by letter of attorney, although the feoffor shall never avoid it, yet after his death, as to all others, in judgment of law, the estate is void, and, therefore, in such case, if his heir is within age, he shall be in ward; or, if he dies without heir, the land shall escheat." Such, also, is the rule as stated in Fitz Herbert's *Nat. Brc.,* 202, c. This is plainly a recognition of the principle that the letter of attorney of an idiot or lunatic is void, though he may not be permitted himself to assert its nullity. His heirs and all others may. The doctrine is also asserted that as against the heirs of a lunatic his deed is invalid, and this, we think, has been steadily maintained in England.

In Thompson v. Leach, reported in Carthew 438, 468, and in Comberbach 211, 235, a clear distinction was taken between the feoffment of a lunatic taking effect by livery of seisin and his deed of bargain and sale, his surrender and grant. The former was held to be voidable only, because of the solemnity of the livery, while the latter were held to be void. The case was ejectment, brought by a lunatic's heirs, and the controlling question was whether his deed was only voidable, or whether it was absolutely void. The grantor had a life estate upon which were dependent contingent remainders, and he made a deed of surrender. If his deed was at any time effective before the contingency happened, it merged the tenancy for life, and destroyed the contingent remainders, and though the deed might afterwards be avoided by any means in law, yet the contingent remainders, being once extinct, could not be revived by any matter *ex post facto.* It was necessary, therefore, to determine whether the deed was a nullity or whether it was good until avoided. The court resolved that the deed was void, *ab initio,* because of the grantor's lunacy. It was said that "there is a difference between a feoffment and livery made *propriis manibus* of an infant, and the bare execution of a deed by sealing and delivery thereof, as in cases of grants, surrenders, releases, etc., which have their strength only by executing them, and in which the formality of livery of seisin is not so much regarded in the law, and, therefore, the feoffment is not void, but voidable; but surrenders, grants, etc., of an idiot are void *ab initio.*" The case is a leading one, and it is in some respects more fully reported in 3 Salk. 300. There it appears

not only that the distinction mentioned is recognized, but that Holt, Ch. J., declared the deed of a person *non compos mentis* to be void; that if he grants a rent, and the grantee distrains for arrears, he may bring trespass; that his letter of attorney or his bond are void, because, as he stated, the law had appointed no act to be done for avoiding them. 2 Vent. 198. Thompson v. Leach has never been disturbed, and, so far as we know, has never been doubted. It was followed by the case of Yates v. Boen, in 2 Strange 1104, which was an action of debt upon articles. The defendant pleaded *"non est factum,"* and offered to give lunacy in evidence. Upon the authority of Thompson v. Leach and Smith v. Carr, decided in 1728, the evidence was received.

The doctrine of Thompson v. Leach was asserted also in Ball v. Mannin, 1 Dow & Clark 380, decided in the House of Lords in 1829. In that case the sole question presented was, by agreement of counsel, whether the deed of a person *non compos mentis* was invalid at law. In the inferior court the judge had charged the jury that "to constitute such unsoundness of mind as should avoid a deed at law, the person executing such deed must be incapable of understanding and acting in the ordinary affairs of life," and refused to charge that the unsoundness of mind must amount to idiocy. The ruling was sustained by the Court of King's Bench in Ireland and, on writ of error, by the Exchequer Chamber. The case was then removed to the House of Lords and the judgment was affirmed. It is, therefore, the settled law of England, and it has been since the decision in Thompson v. Leach, that while the feoffment of an idiot or lunatic is only voidable, his deed, and especially his power of attorney, are wholly void. And now, by act of parliament, 7 and 8 Vict., ch. 76, § 7, his conveyance by feoffment, or other assurance, is placed on the same footing with his release or grant.

Sir William Blackstone, it is true, appears to have overlooked the distinction made in Thompson v. Leach; and in his Commentaries (Book 2, p. 291), while admitting that the law was otherwise prior to the reign of Henry VI, asserted the doctrine that the conveyances of idiots and persons of non-sane memory, as well as of infants and persons under duress, are voidable, but not actually void. But Sir Edward Sugden (1 Sugd. Powers 179; Shelf. Lunatics 257-259) notices this statement with disapproval. His remarks are as follows: "When Beverly's case was decided it was holden that deeds executed by lunatics were voidable only, but not actually void, and therefore they could only be set aside by special pleading, and by the rule of law the party could not stultify himself. And Mr. Justice Blackstone, following the old rule, has laid down that deeds of lunatics are avoidable only, and not actually void. But in Thompson v. Leach the distinction was solemnly established that feoffment with livery of seisin of a lunatic, because of the solemnity of the livery, was voidable only; but that a bargain and sale, or surrender, etc., was actually

void. This, therefore, was the ground of the decision in Yates v. Boen. When the chief justice remembered that an innocent conveyance, or a deed, by a lunatic, was merely void, he instantly said that *non est factum* might be pleaded to it and the special matter be given in evidence."

In this country there has been inconsistency of decision. Some courts have followed Mr. Justice Blackstone and Beverly's case, without noticing the distinction made in Leach v. Thompson, Yates v. Boen, and other English cases. Such are the decisions cited from New York, beginning with Jackson v. Gumaer, 2 Cow. 552, and those relied upon made in other states. Nowhere, however, is it held that the power of attorney of a lunatic, or any deed of his which delegates authority but conveys no interest, is not wholly void. And in Pennsylvania, in the Estate of Sarah De Silver, 5 Rawle 111, it was directly ruled that a lunatic's deed of bargain and sale is absolutely null and void, and the distinction between his feoffment and his deed was recognized. So, also, in Rogers v. Walker, 6 Pa. St. 371, which was an ejectment by a lunatic, it was held that a purchaser from her had no equity to be reimbursed his purchase money, or the cost of improvements, and Chief Justice Gibson said: "Since the time of Thompson v. Leach, Carth. 435-468, it has been held that a lunatic's conveyance executed by sealing and delivery only is absolutely void as to third parties, and why not void as to the grantor? It was said to be so for the very unphilosophical reason that the law does not allow him to stultify himself—an early absurdity of the common law, which was exploded with us by Bensel v. Chancellor, 5 Whart. 371."

The doctrine that a lunatic's power of attorney is void finds confirmation in the analogy there is between the situation and acts of infants and lunatics. Both such classes of persons are regarded as under the protection of the law. But, as already remarked, a lunatic needs more protection than a minor. The latter is presumed to lack sufficient discretion. Reason is wanting in degree. With a lunatic it is wanting altogether. Yet it is universally held, as laid down by Lord Mansfield in Zouch v. Parsons, 3 Burr. 1805, that deeds of an infant which do not take effect by delivery of his hand (in which class he places a letter of attorney) are void. We are not aware that any different rule exists in England or in this country. It has repeatedly been determined that a power of attorney made by an infant is void. Saunderson v. Marr, 1 H. Bl. 75; 2 Lil. Abr. 69; 1 Am. L. Cas. 248, 249. So it has been decided in Ohio (Lawrence v. McArter, 10 Ohio 37); in Kentucky (Pyle v. Cravens, 4 Litt. 17); in Massachusetts (Whitney v. Dutch, 14 Mass. 462); and in New York (Fonda v. Van Horne, 15 Wend. 636). In fact, we know no case of authority in which the letter of attorney of either an infant or a lunatic has been held merely voidable.

It must, therefore, be concluded that the circuit court was not in

error in instructing the jury that a power of attorney executed by an insane person, or one of unsound mind, is absolutely void.

This disposes of the only serious question in the case. There are other assignments of error, but they may be dismissed with brief notice. Those which relate to the admission or rejection of evidence are clearly without merit. The only one which has any plausibility, and which needs particular notice, is that which complains of the refusal of the court to permit a medical witness to give his opinion respecting the sanity of John Hall at the time when he signed the power of attorney, basing his opinion upon the facts and symptoms stated in the depositions read at the trial. The witness was, however, allowed to give his opinion on the testimony adduced by the plaintiffs. The record does not show fully what were the facts stated in the depositions, nor whether they were established by uncontradicted evidence. It may be, therefore, that by the form in which the question was put, the witness was required not merely to give his opinion upon facts, but to ascertain and determine what the facts were. This, of course, was inadmissible. The rule is, as laid down in Greenleaf's Evidence, § 440: "If the facts are doubtful and remain to be found by the jury, it has been held improper to ask an expert who has heard the evidence what is his opinion upon the case on trial; though he may be asked his opinion upon a similar case hypothetically stated." (Sills v. Brown, 9 C. & P. 601.) The question asked was: "From the facts stated in these depositions, and the symptoms stated, what, in your opinion, was the state of John Hall's mind on December 27, 1852, as to sanity or insanity?" It was to this the plaintiffs objected. But the witness gave his opinion, founded on all the testimony adduced by the plaintiffs tending to show insanity, and that opinion was that Hall was capable of doing business and of executing a power of attorney. He could have said no more had he been allowed to consider the evidence given by the defendants as well as that given by the plaintiffs. The defendants, therefore, received no possible injury from the ruling of the court. Hence this assignment cannot be sustained.

There remains one other exception to be considered, for the proper understanding of which a concise statement of the plaintiff's title is necessary. They claimed under a grant made on December 3, 1848, from T. M. Leavenworth, Alcalde of the district of San Francisco, to John Hall, their ancestor. The grant was duly recorded prior to the third of April, 1850, in books deposited in the depositor's office. It was for a part of the *pueblo* lands situate within the corporate limits of the city, as defined in 1851, east of Larkin and north of Johnson street. Subsequently, the claim of San Francisco to her *pueblo* lands was submitted to the United States Border Land Commissioners, and on the 3d day of October, 1854, it was confirmed. An appeal was taken to the district court, and thence transferred to the circuit court, where, on the 18th day of May, 1865, the claim of

the city [illegible] the land, including the lot now in controversy, was granted. And the decree of the district court was affirmed by this court by the decision of the appeal thereto, the mandate having been sent down and filed February 4, 1867. On the 26th of June, 1866, a city ordinance, known as the "Van Ness ordinance," was passed, by which the city relinquished and granted all the right and claim to the lands within her city and water limits as defined by the charter of 1851, to the parties in actual possession thereof, by themselves or by tenants, upon which [illegible] 1, 1855, provided such possession was kept up until the introduction of the ordinance into the common council, or if interrupted by an ouster, had been, or might be recovered by legal process. The ordinance also declared that all persons who had titles to lands within said limited water fronts, lying north of Larkin street and southward of Jackson street, by virtue of any grant by any ayuntamiento, town council, or alcalde of the pueblo, after the 7th of July, 1846, and before the incorporation of the city, which grant, or authenticated copy of which, was registered or recorded in a proper book of record, deposited in the office or custody or keeping of the recorder of the county of San Francisco, on or before April 1, 1855, should, for all purposes contemplated by the ordinance, be deemed to be the possessor of the land granted, and should be in the actual occupancy of persons holding the same adverse to the grantee. As the lot granted to Hall is within the description, the ordinance assured to him whatever right and title the city then had, and conveyed, so far as the city could convey it, the alcalde's grant.

Subsequently, on the 15th of March, 1855, the legislature of the state passed an act confirming and quieting what the city council had done by the Van Ness ordinance, and on the 30th of July, 1866, Congress enacted that all the right and title of the United States to the land within the corporate limits of the city of San Francisco, as defined in the act incorporating the city passed by the legislature of California April 15, 1851, were thereby relinquished and granted to said city for the uses and purposes specified in the respective grants created by an act of the legislature of the state approved on the 14th of March, 1855, excepting, however, from the relinquishment certain reservations not material to the point in hand.

Had the grants and confirmations been effectual to vest in Hall the title to the land in dispute prior to 20 October, 1851, as it is not denied by the plaintiff in error that he claimed under John Hall. The [illegible] title had been given in evidence by the plaintiffs and it was proved that they were the children and heirs of Hall, and [illegible] had proved in chief the defendant and a [illegible] to prove [illegible] their case for the reason among others that [illegible] case of March 3, 1863, it was incumbent upon the [illegible] [illegible] of title had not been connected with [illegible]

the city to the lands, including the lot now in controversy, was confirmed. And this decree of the circuit court was affirmed by this court, by the dismissal of the appeal therefrom, the mandate having been sent down and filed February 4, 1867. On the 20th of June, 1855, a city ordinance, known as the Van Ness ordinance, was passed, by which the city relinquished and granted all her right and claim to the lands within her corporate limits, as defined by the charter of 1851, to the parties in actual possession thereof, by themselves or tenants, on or before January 1, 1855, provided such possession was kept up until the introduction of the ordinance into the common councils, or, if interrupted by an intruder, had been, or might be recovered by legal process. The ordinance also declared that all persons who held titles to lands within said charter limits, lying east of Larkin street and northwest of Johnson street, by virtue of any grant by any ayuntamiento, town council, or alcalde of the pueblo, after the 7th of July, 1846, and before the incorporation of the city, which grant, or material portions of which, was registered or recorded in a proper book of records, deposited in the office or custody or control of the recorder of the county of San Francisco, on or before April 3, 1850, should, for all purposes contemplated by the ordinance, be decreed to be the possessors of the land granted, although it might be in the actual occupancy of persons holding the same adverse to the grantees. As the lot granted to Hall is within this description, the ordinance assured to him whatever right and title the city then had, and confirmed, so far as the city could confirm it, the alcalde's grant.

Subsequently, on the 11th of March, 1858, the legislature of the state passed an act ratifying and confirming what the city councils had done by the Van Ness ordinance, and on the 1st of July, 1864, congress enacted that all the right and title of the United States to the lands within the corporate limits of the city of San Francisco, as defined in the act incorporating the city, passed by the legislature of California April 15, 1851, were thereby relinquished and granted to said city, for the uses and purposes specified in the ordinance thereof, ratified by an act of the legislature of the state, approved on the 11th of March, 1858, excepting, however, from the relinquishment certain parcels not included in the grant to Hall.

That the grants and confirmations were effectual to vest in Hall the title to the land in dispute admits of no question, and it is not denied by the plaintiff in error. He claimed under John Hall. But when this title had been given in evidence by the plaintiffs below, with proof that they were the children and heirs of Hall, and when they had rested in chief, the defendants asked the court to direct a verdict in their favor for the reason, among others, that under the state statute of March 5, 1864, it was incumbent upon the plaintiffs, inasmuch as their action had not been commenced within a year after

its passage, to show an actual possession in themselves or their ancestors within five years next before the commencement of the action, which they had failed to do. Cal. Stat. 1863-4, pp. 149 and 435. The court refused the direction, and correctly. At the time when the request was made it did not appear that the actual possession of the land had not been enjoyed by the plaintiffs within five years next before the action was brought, and, therefore, they were presumed to have had such possession, in the absence of evidence of an adverse possession, and no such evidence has been given. The 9th section of the act of April 22, 1850, which defined the time for commencing civil actions, Cal. Stat. 1850, p. 343, expressly declares that in every action for the recovery of real property such a presumption shall be made in favor of one establishing a legal title. In addition to this, three of the plaintiffs were minors when the title descended to them, and continued minors until within less than five years before the suit was brought (Cal. Stat. 1834, p. 435), and one was a minor until 1872. The period of their disability was, therefore, not to be included in the statutory period of limitation.

It is probable that when the request to direct a verdict for the defendants was made, the supplementary act of April 4, 1864, was overlooked. Certainly it has not been argued here that the plaintiffs below were affected by the act of March 5 of that year. But it is claimed the plaintiffs were barred by the Statute of Limitations of 1855. That, however, is not before us. The circuit court was asked to give no instructions in regard to it, and none was given. Besides, so far as the record exhibits, there was no evidence of continued adverse possession during the five years next preceding the commencement of the suit.

There is nothing more in the case that requires particular notice; nothing which would justify our awarding a new trial.

The judgment is, therefore, affirmed.[1]

KITCHEN v. CAPE GIRARDEAU AND STATE LINE R. R. CO.

1875. SUPREME COURT OF MISSOURI. 59 Mo. 514.

LEWIS, J.—The petition stated in substance that defendant, by a resolution of its board of directors, adopted May 23, 1870, employed plaintiff as its general agent, with an extensive range of powers and duties for the management of its external affairs; that his salary was to be $10,000 per annum, and the engagement was to

[1] See Tarbuck v. Bispham, 2 M. & W. 2.

In Drew v. Nunn, L. R. 4 Q. B. D. 661, it was held that, where one is so insane as not to be able to act for himself, he can not act through an agent.

continue at least six months, or until a contract made on the same day by defendant with the Cairo and Fulton Railroad Company, should be rescinded; that plaintiff entered immediately upon the discharge of his duties, and thenceforth was at all times willing, and held himself in readiness, to perform any services which might be required of him, as such agent, by defendant, for the said term of six months; that defendant had failed and refused to pay, etc., wherefore plaintiff demanded judgment for $5,000.

The answer, after general denials, set up for defense that the adoption of the resolution employing plaintiff was without authority, and was procured by false and fraudulent representations; that plaintiff represented himself as an officer and large stockholder in the Cairo and Fulton Railroad Company; that he had great personal influence with capitalists in this country and in Europe, and with county courts of certain counties; that as agent for defendant, he would procure a transfer from the Cairo and Fulton Railroad Company of valuable franchises and property, including from 200,000 to 400,000 acres of land, and would obtain large county subscriptions to the capital stock of defendant, besides other great aids and advantages to defendant in building its railroad; that these representations were relied upon by defendant, and were the whole inducement to the adoption of the resolutions; but that they all proved to be false and fraudulent, so that defendant realized none of the promised benefits; that defendant, before ascertaining the falsity of said representations, paid to plaintiff, on account of said agency, the sum of $1,943.16, which defendant claimed a right to recover back with interest.

It was also alleged that plaintiff rendered no services under his pretended contract of agency, but abandoned the same wholly, and that defendant had rescinded the contract soon after its date, and discharged the plaintiff upon discovery of said frauds.

A reply was filed by plaintiff, putting in issue all the new matter contained in the answer. The verdict and judgment were in favor of the plaintiff for the amount claimed, less the payment proved by defendant.[1] * * *

The plaintiff's testimony tended to prove the allegations in the petition. At its close the defendant asked the court to instruct the jury that the plaintiff could not recover because he had omitted to prove that defendant was authorized by its charter to make the alleged contract. The refusal so to instruct is assigned for error.

In the absence of charter restrictions, the power of a corporation to make contracts is usually measured by the general objects and purposes of the incorporation. It is always presumed that a corporate body may make any proper contract whose scope and tendency are manifestly to forward the design of its legislative creation. It is

[1] Portions of the opinion are omitted.

often necessary, however, to prove the charter power, where the contract in issue is of a character foreign to such general design. In this case the answer sets out at length the purposes of defendant's incorporation, from which it appears that the agency under consideration was created, if at all, expressly to carry out or advance those purposes. It was, therefore, right to refuse the instruction.[1] * * *[2]

UNITED STATES v. GROSSMAYER.

1869. Supreme Court of the United States. 76 U. S. 72.

Mr. Justice Davis delivered the opinion of the court:

This was a claim preferred under the Captured and Abandoned Property Act, and presents one question for consideration, which the case of the U. S. v. Anderson (*ante* 615), decided at this term, did not contain. It appears that Elias Einstein, a resident of Macon, Georgia, was indebted, when the war broke out, to Grossmayer, a resident of New York, for goods sold and money loaned; and that, while the war was in progress, a correspondence on the subject was maintained through the medium of a person whose name is not disclosed, who passed back and forth several times between Macon and New York. The communication between the parties resulted in Grossmayer requesting Einstein to remit the amount due him in money or sterling exchange, or, if that were not possible, to invest the sum in cotton and hold it for him until the close of the war.

In pursuance of this direction—as it is supposed money or sterling exchange could not be transmitted—Einstein purchased cotton for Grossmayer and informed him of it, who expressed himself satisfied with the arrangement. The cotton was afterward shipped as Grossmayer's to Abraham Einstein, at Savannah, who stored it there in his own name, in order to prevent its seizure by the rebel authorities. It remained in store in this manner until the capture of Savannah in December, 1864, when it was reported to our military forces as Grossmayer's cotton, and taken by them and sent to New York and sold.

On this state of the case Grossmayer insists that he is within the protection of the Captured and Abandoned Property Act, but it is hard to see on what ground he can base this claim for protection. It was natural that Grossmayer should desire to be paid, and creditable to Einstein to wish to discharge his obligation to him, but the same thing can be said of very many persons who were similarly situated during the war, and if all persons in this condition had been

[2] *Accord:* Washburn v. Nashville, etc., R. R. Co., 3 Head (Tenn.) 638.

Regarding the liability of an unincorporated society as principal, see Willcox v. Arnold, 162 Mass. 577.

allowed to do what was done in this case, it is easy to see that it would have produced great embarrassment and obstructed very materially the operations of the army. It has been found necessary, as soon as war is commenced, that business intercourse should cease between the citizens of the respective parties engaged in it, and this necessity is so great that all writers on public law agree that it is unlawful, without any express declaration of the sovereign on the subject.

But congress did not wish to leave any one in ignorance of the effect of war in this regard, for as early as the 13th of June, 1861, it passed a Non-Intercourse Act, which prohibited all commercial intercourse between the states in insurrection and the rest of the United States. It is true the president could allow a restricted trade, if he thought proper; but in so far as he did allow it, it had to be conducted according to regulations prescribed by the secretary of the treasury.

There is no pretense, however, that this particular transaction was authorized by any one connected with the treasury department, and it was, therefore, not only inconsistent with the duties growing out of a state of war, but in open violation of a statute on the subject. A prohibition of intercourse with an enemy during the war affects debtors and creditors on either side, equally with those who do not bear that relation to each other. We are not disposed to deny the doctrine that a resident in the territory of one of the belligerents may have, in time of war, an agent residing in the territory of the other, to whom his debtor could pay his debt in money, or deliver to him property in discharge of it, but in such a case the agency must have been created before the war began, for there is no power to appoint an agent for any purpose after hostilities have actually commenced, and to this effect are all the authorities. The reason why this cannot be done is obvious, for while the war lasts nothing which depends on commercial intercourse is permitted. In this case, if Einstein is to be considered as the agent of Grossmayer to buy the cotton, the act appointing him was illegal, because it was done by means of a direct communication through a messenger who was in some manner not stated in the record able to pass, during the war, between Macon and New York. It was not necessary to make the act unlawful that Grossmayer should have communicated personally with Einstein. The business intercourse through a middle man, which resulted in establishing the agency, is equally within the condemnation of the law.

Besides if, as is conceded, Grossmayer was prohibited from trading directly with the enemy, how can the purchase in question be treated as lawful when it was made for him by an agent appointed after his own disability to deal at all with the insurgents was created?

It is claimed that the purchase by Einstein was ratified by Grossmayer, and that it relieves the case of difficulty; but this is a mis-

taken view of the principle of ratification, for a transaction originally unlawful cannot be made any better by being ratified.

In any aspect of this case, whether the relation of debtor and creditor continued, or was changed to that of principal and agent, the claimant cannot recover.

As he was prohibited during the war from having any dealings with Einstein, it follows that nothing which both or either of them did in this case could have the effect to vest in him the title to the cotton in question.

Not being the owner of the property he has no claim against the United States.

The judgment of the court of claims is reversed, and the cause is remanded to that court, with directions to enter an order dismissing the petition.[1]

SAFFOLD, J., IN LUCAS v. BANK OF DARIEN.

1830. SUPREME COURT OF ALABAMA. 2 Stew. (Ala.) 280.

THAT the ordinary and legitimate sphere of mercantile transactions is limited to simple contracts; and that the general power delegated by one member of a firm to another, by forming a mercantile connection, is equally limited, are propositions to which I readily assent. The consequence of which is that one partner cannot directly bind another by deed, nor can he constitute an agent or attorney with sufficient authority to bind the partner in any obligation in the nature of a specialty, unless the other has given special authority, or, being present, consents by parol or otherwise, except that he may make any fair disposition of the partnership effects, or release a debt to the firm under seal, and make it operate against the whole. 2 Caines' Rep. 254-5, note A and cases there cited; also 1 H. & M. 423; 19 Johns. Rep. 513; 3 Kent's Com. 24.

In this case, however, it is not contended that the complainant has been subjected to any immediate obligation by deed or bond, either by J. Lucas, the partner, or by either of the attorneys appointed by him. But it is said that the principles of the objection equally restrained J. Lucas from delegating by power, under seal, the authority to Fort or Kenan to sign or indorse the notes or accept the service of writs, or do any other act; that even an act which would be

[1] "No active business can be maintained, either personally or by correspondence, or through an agent, by the citizens of one belligerent with the citizens of the other. The only exception to the rule recognized in the books (if we lay out of view contracts for ransom and other matters of absolute necessity) is that of allowing the payment of debts to an agent of an alien enemy, where such agent resides in the same State with the debtor." Bradley, J., in New York Life Insurance Co. v. Davis, 95 U. S. 425, 429.

Section 2.—Who may be Agent

LYON & CO. v. PEVIT, PAYNE & CO.

1891. Supreme Court of Alabama. 45 Ala. 192.

LYON, Payne & Co. of Richmond, Va. owned some cotton in Alabama. They gave an order on their agent, Brewster, who had charge of the cotton, to one Jernigan in Quincy, Fla. who claimed

[1] See notes to Section 3, Who may be Principal.
Concerning the right of a married woman to be principal or agent, see Powell v. Hankins, 67 Ala. 369.

valid against the firm without a seal, if done by the partner, or by agent under a parol appointment, would be void if executed by specialty. On this point, I think a nice discrimination is required. I take the distinction to be this: that if the bond or deed constitutes the contract, it must be made the evidence of it, and determines the remedy; then this principle applies, because the legal effect of the contract, the power of the remedy, and the rules of evidence are essentially different, the security being of higher dignity. 3 Kent's Com. 24. Here the objection relative to the sealed instruments is, that agents acted by virtue of powers created under seal by one of the partners. The only material question is, did those agents act with the consent, or by the authority of the firm? If one partner had power to constitute an agent in any form to do these acts, what injury can result, or how can it be material that the authority was given with unnecessary solemnity? The acts done by the agents are in the same form, and have but the same legal effect, as if the authority had been given in any other way. It is usual and necessary that partners in merchandise should have agents or clerks, with authority to represent them generally. The act of signing notes and giving indorsements in the partnership transactions, is a power falling within the usual scope of mercantile dealings; each partner can buy and sell partnership effects, and make contracts in reference to the business of the firm, and pay and receive, and draw and indorse and accept bills and notes. Garard v. Basse, 1 Dallas R. 119; 3 Kent's Com. 17, and references there given. Hence, I am of opinion that the appointment of Fort, and his acts as attorney in signing and indorsing the notes are valid, and tantamount to an appointment by both members of the firm; and that so much of the power as gave it the character of a deed was unnecessary and irregular and ought to be treated as surplusage which does not vitiate. The authority to Kenan in like manner to accept service of the writs is more questionable.[1]

Section 2.—Who can be Agent.

LYON & CO. v. KENT, PAYNE & CO.

1871. Supreme Court of Alabama. 45 Ala. 656.

Kent, Payne & Co., of Richmond, Va., owned some cotton in Alabama. They gave an order on their agent, Browder, who had charge of the cotton, to one Singleton, of Quincy, Ill., who obtained

[1] See Paton v. Baker, 62 Iowa 704.
Regarding the rights of a tenant in common to be principal, see Sewell v. Holland, 61 Ga. 608.

possession of the cotton. Singleton sold the cotton to Guy, who stored it in the warehouse of Lyon & Co. Kent, Payne & Co., believing that Singleton had no authority to sell it, brought this action of detinue against Lyon & Co. for the cotton. In the trial court the plaintiffs had judgment.

PETERS, J.—The charge given by the court, of its own motion, on the trial below, and excepted to by the defendants, was correct. The only negotiation that Singleton had with the firm of Kent, Payne & Co., touching the cotton, took place in January, 1865, at Richmond, Va. If there was a sale at all, or any contract entered into between Singleton, a citizen of Illinois, and Kent, Payne & Co., citizens of Virginia, by which any title or interest in the cotton was attempted to be passed from one to the other, it was wholly void and incapable of ratification. No trading between these parties was then allowable, without a permit of the government. And the president's pass was not sufficient for that purpose. McKee v. United States, 8 Wall. 163, 166; The Ouachita Cotton, 6 Wall. 521, 531; Brown v. Tarkinton, 3 Wall. 377, 381; Kennett v. Chambers, 14 How. 38, 50. Then, the order alone warned all who looked upon it, who knew the domicil of the parties to it, that it could not be evidence of a legal title. And it was not, unconnected with other proof, a power to sell or dispose of the cotton.

Yet, though the order of itself was not evidence of a sale to Singleton, or a power to sell, it shows that the owners of the cotton had authorized him to *take possession* of it. This he could do as the agent of the owners. This was not forbidden to him or to them by law, or the policy of the government. They could change the agency or the custody of their cotton from one person to another. And they could make any person, capable of acting as an agent, such agent to take possession of their property for them, and keep it for them. They could transfer its custody from Browder to Singleton without a violation of law. The objection which might be supposed to exist to such an agency during the war ceased as soon as the war was ended; and its purpose being then legal, it might be legally consummated. Any one, except a lunatic, imbecile, or child of tender years, may be an agent for another. It is said by an eminent author and jurist that, "It is by no means necessary for a person to be *sui juris,* or capable of acting in his or her own right, in order to qualify himself or herself to act for others. Thus, for example, monks, infants, *femes covert,* persons attainted, outlawed or excommunicated, villains and aliens, may be agents for others." Story's Agency, §§ 6, 7, 9. So, a slave, who is *homo non civilis*, a person who is but little above a mere brute in legal rights, may act as the agent of his owner or his hirer. Powell v. The State, 27 Ala. 51; Stanley v. Nelson, 28 Ala. 514. It was, then, certainly not unlawful, or against the public policy of the nation, for Kent, Payne & Co. to keep their cotton, and keep it safely, during the late rebellion. It is the undoubted law of agency,

that a person may do through another what he could do himself in reference to his own business and his own property, because the agent is but the principal acting in another name. The thing done by the agent is, in law, done by the principal. This is axiomatic and fundamental. It needs no authorities to support it. *Qui facit per alium facit per se.*[1] * * *

THE GOVERNOR v. DAILY.

1848. Supreme Court of Alabama. 14 Ala. 469.

Chilton, J.—This was an action of debt, on a constable's bond, brought by the plaintiff in error against the defendant. The declaration sets out the bond and condition, and assigns several breaches, among which is one breach averring that the defendant, Daily, as constable, by virtue of a writ of seizure, issued by a justice of the peace, upon a complaint in the nature of a libel against a flatboat called the *Creole,* did seize upon and take said boat into his possession. That the libel was afterwards dismissed, and the said Daily refused to surrender and deliver up the said boat to Feny, the person for whose use this suit was brought. It appears by a bill of exceptions that prior to the seizure the boat had been in the actual possession of a slave of Feny, called Jim, and that at the time it was seized, the boat was in possession of said slave and a white man employed by the owner. That Daily had intrusted the custody of the boat to the libellant, as his bailiff, who, after the discharge of the boat, meeting the slave, Jim, in sight of the boat, said to him, "Jim, there is your boat." The court charged the jury that if the boat had been under the management of said slave, and was in his possession at the time of the seizure, a delivery to him was a sufficient delivery to its owner. Further, that if the expression above used was made to the slave by the person in possession of the boat, and was designed by him as a delivery, and an authority to said slave to take possession of the boat, then the expression amounted to a delivery.

1. It is insisted by the plaintiff in error that this charge is erroneous, as an abstract proposition; that it was not pertinent, and was calculated to mislead the jury.

The position taken by the plaintiff's counsel, that a slave cannot be an agent, cannot be maintained. In Chastain v. Bowman, 1 Hill 270, it is held, the master may constitute his slave his agent, and that there is no condition, however degraded, which deprives one of the right to act as a private agent—the master is liable even for the act of his dog, done in obedience to his command. Perhaps there are no

[1] A portion of the opinion is omitted.

persons capable of comprehending an authority, or acting in pursuance thereto, who may not be constituted agents. Thus it is said infants, married women, persons attainted, outlawed, excommunicated, aliens, etc., may be constituted attorneys. 1 Livermore on Ag. 32, 33; Co. Lit. 52, a. Neither is it necessary, in order to prove the agency, to show an express delegation of authority, but the agency may be inferred from the nature of the employment. So in the present case, if the slave, Jim, had, as the agent of his owner, control of the boat, and was in the actual possession at the time of the seizure, his agency is presumed to continue, and a return of the boat might well have been made to him. If, in the meantime, his owner had assigned him another occupation, this would be evidence of a revocation of his authority. But the charge, although correct in this respect, is clearly wrong when it assumes the equivocal expression, "Jim, there's your boat," if designed by the bailiff as an authority to the servant to take the boat, amounted to a delivery, whether so understood by the servant or not. The expressions used amount to a mere pointing out, or a designation of the boat, and disconnected from all other facts, confer no warrant on the slave to take possession. The question whether there was a delivery was one of fact, and the jury could alone judge whether the evidence sufficiently proved it. As the intention or design of the bailiff to make a delivery of the boat was not apparent from the language used, it follows no delivery was made, unless the servant was apprized of the design and intention to make it, by the terms employed.[1] * * *

Judgment reversed and cause remanded.[2]

TALBOT v. BOWEN.

1819. Court of Appeals of Kentucky. 1 A. K. Marsh. 436.

On a writ of error to reverse a decree of the Henderson circuit court.

Owsley, J.—This suit was brought in chancery by Bowen, to obtain a title to a moiety of a lot of ground in the town of Henderson, the equity whereof is asserted by him through a certain William Featherston, who, it is alleged, purchased it from the son and agent of Talbot.

[1] A portion of the opinion not dealing with the subject of Agency is omitted.

[2] "Where the overseer of a slave goes to a house where spirituous liquors are kept for sale, and tells the keeper that he will send the slave for a specified quantity of a particular quality, and goes off and sends the slave with a jug for the same; and thereupon the keeper puts it in the jug, and delivers it to the slave, the transaction is, in legal contemplation, the sale and delivery of the liquor to the overseer. The slave, in such case, is merely the instrument of the overseer." Rice, J., in Powell v. State, 27 Ala. 51, 52.

The purchase of Featherston is admitted by the answer of Talbot, but the authority of his son to sell the land is denied; and if authorized, it is contended that, owing to his son's infancy, and the inadequacy of the consideration for which the sale was made, a specific execution of the contract ought not to be inferred.

On a final hearing, the court below being of opinion that Bowen was entitled to relief, pronounced a decree appointing commissioners, and ordering them to convey the lot, without making their conveyance depend upon the failure of Talbot to execute a deed.

The main objection taken to the relief sought in the bill involves the propriety of decreeing an execution of the contract, without evidence in writing of the terms of Featherston's purchase from the son of Talbot.

As the contract was for the sale of land, there is no doubt but, according to the plain and obvious import of the statute against frauds and perjuries, that Talbot might have required written evidence of the terms of sale; but this we apprehend could have been done in no other way than by either denying the sale, or pleading, or relying upon the statute, in his answer.

Upon a denial of the sale, as it would have devolved upon Bowen to have proven it, the evidence should, no doubt, to authorize a decree in his favor, conform to the requisitions of the statute; or upon the statute being either pleaded or relied on in the answer, then, as evidence of the sale should also be introduced, proof of its terms having been reduced to writing, would, most clearly, be essentially necessary to entitle Bowen to relief.

But in the present case, as the purchase of Featherston is admitted by the answer of Talbot, and as the statute is not relied upon by him, it cannot, either for the purpose of proving the sale or taking it out of the statute, have been necessary for Bowen to introduce any evidence whatever in relation to the terms of sale. The failure, therefore, to manifest by writing the terms of Featherston's purchase, affords no objection to the relief sought by Bowen.

But as the authority of Talbot's son is expressly denied, it is also contended that evidence of his authority should not only have been introduced, but it is moreover urged that the authority should be shown to have been in writing. That to make the sale obligatory upon Talbot, his son must have been clothed with power to sell, is a proposition not to be controverted; but as respects the justice of the case, it cannot be material whether the authority was created either by writing or parol, and the statute against frauds and perjuries has never been held to require it to be in writing.

And that the son was authorized, either verbally or in writing, to make the sale, from the circumstances detailed in evidence, there is no room for a moment to doubt.

And if authorized, according to the settled doctrine of the law, his being an infant can afford no objection against the liability of Tal-

bot; for although the contracts of infants are not, in all cases, binding upon them, there is no doubt but, as they may act as agents, their contracts, made in that character, if otherwise unexceptionable, will be binding upon their principal.

With respect to the inadequacy of the consideration relied upon by Talbot, it need only be remarked that the evidence conduces satisfactorily to prove that the full value of the lot at the time of its sale was given for it by Featherston.

Upon the whole, we are satisfied that Bowen is entitled to a specific execution of Featherston's purchase; but we are of opinion that it was irregular to direct the commissioner to convey, without giving Talbot a previous day to do so. For that irregularity, therefore, the decree must be reversed with cost, the cause remanded to the court below, and a decree there entered according to the principles of this opinion.[1]

JENKINS v. FLINN.

1871. Supreme Court of Indiana. 37 Ind. 349.

This was an action by Jenkins, as assignee in bankruptcy, against Elijah Flinn and his wife, Charlotte, for the price of certain goods sold to the wife by the bankrupts but charged to the husband. The question was whether an agency might be inferred, on the part of the wife, for the husband, so as to make him liable for the goods.

Downey, J. (After stating the facts.) Was this evidence sufficient to show a legal liability on the part of the husband to pay for the goods? According to the common-law rule, the earnings of the wife are always the property of the husband just as much as are the earnings of his own hands. Bishop Married Women, §§ 21, 212, 886; Baxter v. Prickett's Adm'r, 27 Ind. 490. He was entitled to her earnings, because he was bound for her support, and this whether she earned much or little. Bishop Mar. Women, § 887.

If she engage in any trade or business, the profits of such trade or business belong to the husband, for they are as much the earnings of the wife as any other income produced by her labor or skill. *Id.*, § 733; Switzer v. Valentine, 4 Duer 96.

This rule is still in force in Indiana as a part of the common law. The statute provides that the lands of a married woman and the profits thereof shall be her separate property as fully as if she was unmarried. 1 G. & H. 374, § 5. It is also provided that "the personal property of the wife held by her at the time of her marriage, or acquired during coverture, by descent, devise, or gift, shall re-

[1] Compare Bennett v. Gillette, 3 Minn. 309.

In Widrig v. Taggart, 51 Mich. 103, it was held that an infant was not liable to his employer for breach of the contract of employment.

main her own property to the same extent and under the same rules as her real estate so remains; and on the death of the husband before the wife, such personal property shall go to the wife, and on the death of the wife before the husband, shall be distributed in the same manner as her real estate descends, and is apportioned under the same circumstances." Acts 1853, p. 57, copied in note to p. 295, 1 G. & H. It will be seen that this statute reached only to such personal property of the wife as she had at the time of the marriage or acquired during the coverture by descent, devise, or gift, thus leaving, as we think, the common-law rule with reference to the husband's right to the wife's earnings unchanged. Baxter v. Prickett's Adm'r, *supra*.

It follows that if the wife engaged in trade and purchased goods to be used or sold in such trade, they became the property of the husband, unless purchased with money acquired and belonging to her as above stated. Switzer v. Valentine, *supra;* Glann v. Younglove, 27 Barb. 480; Lovett v. Robinson, 7 How. Pr. 105.

As the wife holds her separate property as fully as if she was unmarried, we suppose she may engage in and carry on business therewith, with the assent of the husband, and be entitled to the profits which she may make as an increase of her separate estate. But she cannot bind herself for goods purchased as a *feme sole* can do. Hasheagen v. Specker, 36 Ind. 413.

Where the wife engages in business, with the knowledge and consent of the husband, the business is regarded as that of the husband, the wife as his agent, and he as bound for the performance of contracts which she may make relating to such business. Abbott v. Mackinley, 2 Miles 220; Glann v. Younglove, *supra;* Cropsey v. McKinney, 30 Barb. 47; Mackinley v. M'Gregor, 3 Whart. 368; Godfrey v. Brooks, 5 Harring. (Del.) 396; Rotch v. Miles, 2 Conn. 638; Switzer v. Valentine, *supra;* Chitty Con., 184; 2 Bright Hus. and Wife, 300, § 20.

As a qualification of the rule last stated, it seems to be satisfactorily established by the cases that where the wife incurs the indebtedness, and the credit is given to her exclusively, and where, therefore, there can be no presumption that she was acting as the agent of the husband merely, the husband is not liable. Bentley v. Griffin, 5 Taunt. 356; Carter v. Howard, 39 Vt. 106; Moses v. Forgartie, 2 Hill (S. C.) 355; Swett v. Penrice, 24 Miss. 416.

The theory upon which the husband is bound to pay for necessaries purchased by the wife is that the wife is his agent for the purpose of purchasing such articles as may be necessary while the parties live together. Litson v. Brown, 26 Ind. 489.

Proceeding to examine the facts of the case under consideration, in view of these legal propositions, we find that by the evidence it is shown that the husband knew that the wife was engaged in business, to some extent he derived a profit from the business, the wife sup-

porting herself and contributing to the support of the children, which, otherwise, he would have been compelled to. He had paid $550 of her debts, but whether on account of this business or not is not shown.

On the other hand, it is shown by the agreed statement of facts that she received the goods and agreed to pay for them; and he testifies that he never bought anything of the plaintiffs nor ever agreed to pay them anything; that he never saw the bill of the goods or knew of their purchase. It is not shown that the credit was given to the husband, or even that the plaintiffs knew that there was any such person in existence.

After some hesitation, and without any very firm conviction that we are right, we have come to the conclusion that we ought to hold that the credit in this case was given to the wife, and that we cannot infer from the circumstances an agency in the wife and a liability of the husband.

Judgment affirmed, with costs.[1]

KILLINGSWORTH v. PORTLAND TRUST COMPANY.

1890. Supreme Court of Oregon. 18 Ore. 351.

Lord, J.—This is an action to recover damages for failure of the defendant to execute and deliver to the plaintiff a conveyance of certain premises, pursuant to an agreement to that effect. The defendant denies this, and alleges, as the attorney in fact of one Deborah H. Ingersoll, in compliance with said agreement, that it did not execute and tender to the plaintiff a conveyance of said premises, etc., and now brings it into court and deposits it for the plaintiff, and that plaintiff refuses to accept the same. To this the plaintiff demurred, on the ground that the same does not state facts sufficient to constitute a cause of defense to the cause of action alleged. The point raised by the demurrer is, can the defendant, a corporation, execute a deed of conveyance of real property as the attorney in fact of another? In this state the right to become incorporated is secured by a general law, and any persons may avail themselves of it by complying with its provisions. Corporations which owe their

[1] "A *feme covert* may act as the agent or attorney of her own husband, and as such, with his consent, bind him by her contract or other act. * * * She may act as the agent of another in a contract with her husband, and when she does, or when she is the mutual agent of her husband and a third person, her declarations may be given in evidence by the husband, and in his favor." Dixon, C. J., in Birdsall v. Dunn, 16 Wis. 250, 254.

"A married woman is capable of being appointed and acting as the agent of a third person, without the consent of her husband." Clopton, J., in Pullam v. State, 78 Ala. 31, 33.

existence to the common law must be governed by it in the mode of their organization, in the manner of exercising their powers, and in the use of the capacities conferred. But the legislature may authorize the creation of corporations for many purposes not contemplated by the common law and endue it with powers and capacities to be exercised in disregard of its rules, or which may greatly extend, modify, or limit its common-law powers and privileges. The measure of the legislative power in this regard is limited only by circumstantial provisions. Ordinarily, in the creation of corporations, the common-law incidents and powers are implied, unless otherwise provided or restrained by the law of its corporate existence. But in determining the nature and extent of the powers and capacities conferred on a corporation, and the mode of their exercise, the law of its creation, whether a charter or a statute, must be consulted; for it has no power except as thus given, either expressly or as incidental to the exercise of the powers granted.

It is provided by our statute that a corporation may engage in any lawful enterprise, business, pursuit, or occupation (Code, § 3217), so that, unless corporations are affected with some disability when the articles of incorporation are sufficient for the purpose, there is no lawful occupation or business in which it may not engage in this state exactly as individuals. By its articles of incorporation the defendant corporation is expressly authorized and empowered "to act as the general or special agent, or attorney in fact, for any public or private corporation, or person, in the management and control of real estate or other property, its purchase, sale, or conveyance, etc." No question is made but what the defendant, by its articles of incorporation, has conferred upon it the power to do the act for which there is claimed to be an alleged failure; but the contention is that a corporation, from the nature of the organization as an artificial body, necessitated to act through agents, is incapable of executing a deed as an attorney in fact. This argument is based on the assumption that there are some things, from the inherent nature of the case, that a corporation is incapable of doing, and seeks its illustrations in the common law, as that a corporation cannot be an administrator or executor, because its duties are of a personal nature and cannot be delegated, or to take an oath, when so required by law, before proceeding to execute some duty or trust. But this argument overlooks the fact that a corporation may be empowered to do by statute what it was incapable of doing under its common-law powers, and when thus created, its powers, capacities and modes of exercising them depend upon the statute. Nor is the disability in such cases of a character which cannot be obviated by statute, for, as Mr. Morawetz says, there are numerous instances in which corporations have been expressly empowered by statutes to administer estates. Morawetz on Corporations, § 357.

The reason why a corporation was unable to perform the office of

executor or administrator, as stated by Blackstone, was that it could not take an oath for the due execution of the office. 1 Bla. Com. 477. But to enable a corporation to act as executor or administrator, the statute may dispense with the oath, or provide that some one of its officers may take it, or the law of the state may not require any oath for the due execution of the office, and in such case, when no other impediment intervenes, a corporation may act as administrator when the law of the state does not require the administrator to take an oath. It was not so held in Deringer's Adm'r v. Deringer's Adm'r, 5 Houst. 416; 1 Am. St. Rep. 156. So, too, in Lincoln's Sav. Bank v. Ewing, 12 Lea 602, where it was urged that a corporation was incapable of taking to itself a mortgage or trust conveyance, it was held that a corporation may take and hold as a trustee or mortgagee, and execute a trust in which it has an interest within the scope of its business, and a failure or inability to comply with the provisions of the code, by taking the required oath, would not affect the validity of the deed or the title vested. As it is not questioned that the business in which the defendant is engaged is a lawful occupation, and that the articles of incorporation are sufficient to confer the power on the defendant to act as an attorney in fact in furtherance of its legitimate objects, there is nothing to prevent it from doing the acts essential to carry on its business and comply with the terms of its agreement, unless it is incapable of performing such acts from some cause inherent in itself. A corporation, like a natural person, has a right to conduct its legitimate business by all the means necessary to effect such object. Within its prescribed range it can do whatever a natural person, *mutatis mutandis,* could do. Wharton on Agency, § 57. In Barry v. Merchants' Exchange Co., 1 Sand. Ch. 280, it is said: "Every corporation, as such, has the capacity to take and grant property and to contract obligations the same as an individual. * * * And every such corporation has power to make all contracts which are necessary and usual in the course of the business it transacts, as means to enable it to effect such objects, unless expressly prohibited by law." Having the power conferred upon it to act as an attorney in fact, is it not endowed with all the faculties or capacities essential to execute it and carry out the business projects of its creation? Why may not a corporation act as an agent for an individual or another corporation? As the owner of real property, it can, by its authorized agents, execute a conveyance, or it may authorize another, by power of attorney in writing, to convey such property for it. Why, then, may it not act as the agent or attorney in fact of another for a like purpose, when it is so authorized, and to thus act is one of the chief powers conferred to effect the object of its creation and to carry on the business in which it is engaged?

"Within the scope of its corporate powers," says Mr. Mechem,

unless there are express provisions in the charter, or constituent instruments to the contrary, a corporation may act as agent either for an individual, a partnership or another corporation. Many of the great corporations of the country are organized for this express purpose under statute or charters conferring and defining their powers and the methods of exercising them; and even in the case of authority so to act might be implied as incident to the main purpose." Wadham on Agency, § 69. It is clear that such a corporation may act as the agent of another and if so, it must be endowed with the faculties or instrumentalities to perform the office. It is not necessary to undertake and carry out the purposes of the organization. When a corporation engages in a particular business and is authorized by its incorporators to do the things necessary to carry on such business, it has express grant of power to employ agents to that object. If it is to be excluded from doing such things because from the nature of its organization it cannot act personally, but only through agents, there would be little left in the domain of business it could do. As was said by the court in Hawkins v. Pittsburg Times, 64 Penn. 340: "The common law rule with regard to natural persons, that an agent so appointed by deed, cannot in the nature of things be applied to corporations aggregate, these being of mere legal existence, and understood as such, literally speaking, are incapable of a personal act. They direct or execute only, but their most immediate mode of action must be by agents." Being a creature of the law—an artificial person—it can only act by agents, who are its limbs or instrumentalities to effect the purpose for which it was organized, and to act for it, does not bring the act of the corporation equally as the act of an individual in his own behalf under the principle of the Brazilian council, it could not make an acknowledgment in person, but it may by its officers, and in such deed, its officer affixing the seal of the corporation, no doubt within the meaning of the statute requiring deeds to be acknowledged by the grantor. Kelly v. Calhoun, 46 Ill. 520; Cowburn M. B. Co. v. Price, 51 Md. 208; Am. & Eng. Encyc. of Law, tit. Acknowledgment, Corporations.

In fact, within the same principle of reasoning, it may be said that a corporation cannot make a deed of its own property, but we know it can and that the act of its officers is as strong as the act of the corporation. When a corporation is using the power of another to sell and convey property, it acts through the same instrumentalities as when acting for itself, and the relation between it and its intermediate agent is one kind of artificial person to the performance of its engagement and involves no delegation of powers. So does when a corporation is invested with a power of attorney to sell and convey real property, the person conveying the power knows that the corporation cannot act personally in the matter but that it acts

4—Encyclo Corp.

"unless there are express provisions in its charter, or constating instruments to the contrary, a corporation may act as agent either for an individual, a partnership or another corporation. Many of the great corporations of the country are organized for this express purpose under statute or charters conferring and defining their powers and the methods of executing them; but even in other cases the authority so to act might be implied as auxiliary to their main purpose." Mechem on Agency, § 64. It is clear, then, that a corporation may act as the agent of another, and if so, it must be endued with the faculties or instrumentalities to perform the office it is authorized to undertake and carry out the purposes of its creation. When a corporation engages in a legitimate business, and is authorized by its incorporation to do the things necessary to carry on such business, it is an express grant of power to enable it to effect that object. If it is to be excluded from doing such things because, from the nature of its organization, it cannot act personally, but only through agents, there would be little left in the domain of business it could do. As was said by the court in Hopkins v. Gallaton Turnpike Co., 4 Hump. 412: "The common-law rule with regard to natural persons, that an agent, to bind his principal by deed, cannot in the nature of things be applied to corporations aggregate, these being of mere legal existence, and their board, as such, literally speaking, are incapable of a personal act. They direct or assent by vote, but their most immediate mode of action must be by agent." Being a creation of the law—an artificial person—it can only act by agents, who are its limbs or instrumentalities, to effect the purpose for which it was organized, and to act for it, their act being the act of the corporation exactly as the act of an individual is his act. As such, upon the principle of the objection raised, it could not make an acknowledgment in person, but it may by its officers, and in such cases, its officer affixing the seal is the party executing the deed within the meaning of the statute requiring deeds to be acknowledged by the grantor. Kelly v. Calhoun, 95 U. S. 711; Frostburg M. B. Assn. v. Brace, 51 Md. 508; Am. & Eng. Ency. of Law, tits. Acknowledgment, Corporations.

In fact, within the same principle of reasoning, it may be said that a corporation cannot make a deed of its own property; but we know it can, and that the act of its officers in so doing is the act of the corporation. When a corporation is made the agent of another to sell and convey property, it acts through the same instrumentalities as when acting for itself, and the relation between it and its instrumentalities are as one being or artificial person, in the performance of its engagement, and involves no delegation of powers. So that when a corporation is invested with a power of attorney to sell and convey real property, the person conferring the power knows that the corporation cannot act personally in the matter, but that in per-

forming the engagement it will act through its agents, who for that purpose are its faculties, and whose acts in the discharge of that duty are the acts of the corporation, and, as such, must be considered to be included in the artificial person as instrumentalities authorized by him to do the act conferred upon it by his power of attorney. In this view, the argument that the corporation cannot do such act under the power of attorney without a delegation of authority to its agents, and that the grantor of the power has given no such power of substitution, cannot be sustained.

There was no error, and the judgment must be affirmed.[1]

HOLT v. GREEN.

1873. Supreme Court of Pennsylvania. 73 Pa. St. 198.

Mercur, J.—The plaintiff brought this suit to recover commissions for the sale of certain machinery sold by him for defendant. It appeared upon the trial of the cause that the plaintiff was carrying on the business of a commercial broker, and as such broker rendered the services for which the commissions were claimed. He also testified that he had not taken out a license nor paid a special tax under the act of congress. Upon this the learned judge nonsuited the plaintiff and judgment was entered thereon. This is assigned for error.

The question thus presented is, did the plaintiff's omission to pay the tax and obtain the license as a commercial broker bar his recovery of commissions for services rendered as such brokers?

The act of congress of June 30, 1864, § 71, provides that no person * * * shall be engaged in prosecuting or carrying on any trade, business or profession hereafter mentioned and described until he * * * shall have obtained a license therefor in the manner hereinafter provided. Section 73 provides that any person carrying on the business without a license shall be liable for each offense to a certain fine and imprisonment therein specified.

Section 79 provides that commercial brokers shall pay $20 for each license. Any person whose business it is as a broker to negotiate sales or purchases of goods, wares, products or merchandise shall be regarded a commercial broker under this act.

An action founded upon a violation of the laws of the United States or of this state cannot be maintained in the courts of this state. Maybin v. Coulon, 4 Dall. 298; s. c. 4 Yeates 24.

[1] "The relation of principal and agent, or master and servant, may exist between a corporation and an employer as well as between individuals." Campbell, J., in McWilliams v. Detroit Central Mills Co., 31 Mich. 274, 276.

it is not necessary that the arrest should expressly declare the contract to be void. An action founded upon a transaction prohibited by a statute cannot be maintained, although a penalty be imposed for entering into it. Sedgworth v. Overman, 6 East, 568. Hence where a contract is made about a matter or thing which is prohibited and made void by statute, it is void, though the statute says that the parties so doing shall by the said statute incur a penalty on the offender. Columbia Bridge Co. v. Haldeman, 7 Watts & Serg. 158. Nor is there any distinction in this case whether the contract is merely prohibited or malum in se. Columbia Bridge Co. v. Haldeman, 7 Watts & Serg. 158.

The only matter of consideration connected with an illegal transaction is capable of being enforced by law is whether the plaintiff requires the aid of the illegal transaction to establish his case. Cowan v. Scott, 13 Serg. & Rawle 314; Thorne v. Deas, 4 Johns. 84; Tenant v. Elliott, 1 Bos. & Pul. 3; Holman v. Johnson, Cowp. 341. If a plaintiff cannot open his case without showing that he has broken the law, a court will not assist him. Thorne v. Deas, *supra*. It has been said that the objection may often sound very ill in the mouth of a defendant, but it is not for his sake the objection is allowed; it is founded on general principles of policy which he shall have the advantage of contrary to the real justice between the parties. That principle or public policy is that we courts will lend its aid to a party who grounds his action upon an immoral or upon an illegal act. Mitchell v. Smith, 1 Binn. 118; Commonwealth v. Charles Adams, *supra*. The principle to be extracted from all the cases is, that no law will ever lend its support to a claim founded on its own violation. Coppel v. Hall, 7 Wall. 558.

Apply these principles to the case. The bill of particulars served on the defendant avers the plaintiff's demand is founded on his claim as commissioner as a broker or assistant or commissioner to the sale of certain cattle and other personal and real machinery of a certain woolen mill, put in his hands for sale by the defendant on or about May, 1866." Now the court be required from the business was known, and nothing necessary for other purpose. The question to be decided is can be allowed that he was engaged in a business directly contrary to a clear and express act of congress. That for as long as such a law stands on the statute book it is void and unenforceable. The issue with which he did it cannot be inquired into in this action. His right to commissions as agent rests upon his illegal acts. His right to recover in the least degree upon his legal right to perform the services. The law as which he certified does not be had no such right.

Without the act of the illegal transaction, he could not, and did not show any [illegible] performed. His case as he claims it is based upon a clear violation of the statute. He grounds his action upon that violation. [illegible] his case he cannot successfully invoke the aid of [illegible].

We are aware that the most highly respectable as well as the

It is not necessary that the statute should expressly declare the contract to be void. An action founded upon a transaction prohibited by a statute cannot be maintained, although a penalty be imposed for violating the law. Seidenbender *et al. v.* Charles' Administrators, 4 Serg. & Rawle 159. Hence where a contract is made about a contract or thing which is prohibited and made unlawful by statute it is void, though the statute itself does not declare it shall be so, but only inflicts a penalty on the offender. Columbia Bridge Co. v. Halderman, 7 Watts & Serg. 233. Nor is there any distinction in this state, whether the contract is *malum prohibitum* or *malum in se.* Columbia Bridge Co. v. Halderman, 7 Watts & Serg. 233.

The test whether a demand connected with an illegal transaction is capable of being enforced by law is, whether the plaintiff requires the aid of the illegal transaction to establish his case. Swan v. Scot, 11 Serg. & Rawle 164; Thomas v. Brady, 10 Barr. 170; Scott v. Duffy, 2 Harris 20. If a plaintiff cannot open his case without showing that he has broken the law, a court will not assist him. Thomas v. Brady, *supra.* It has been well said that the objection may often sound very ill in the mouth of a defendant, but it is not for his sake the objection is allowed; it is founded on general principles of policy which he shall have the advantage of, contrary to the real justice between the parties. That principle of public policy is that no court will lend its aid to a party who grounds his action upon an immoral or upon an illegal act. Mitchell v. Smith, 1 Binn. 118; Seidenbender v. Charles' Adm'rs, *supra.* The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded on its own violation. Coppel v. Hall, 7 Wall. 558.

Apply these principles to this case. The bill of particulars served on the defendant avers "the plaintiff's demand is founded on his claim to commissions as a broker or salesman on commission, for the sale of certain cards and other spinning and their machinery of a cotton or woolen mill, put in his hands for sale by the defendant, on or about May, 1866." Upon the trial he testified that his business was buying and selling machinery for other parties. The moment he opened his case he showed that he was engaged in a business directly contrary to a clear and express act of congress. That for so doing he was liable to a fine and imprisonment. The intent with which he did it cannot be inquired into in this action. His right to commissions as shown rested upon his illegal acts. His right to recover in law must depend upon his legal right to perform the services. The facts to which he testified showed he had no such right.

Without the aid of his illegal transactions, he could not, and did not, show any services performed. His case as he exhibits it is based upon a clear violation of the statute. He grounds his action upon that violation. Thus resting his case, he cannot successfully invoke the aid of a court.

We are aware there are some English authorities, as well as de-

cisions in some of our sister states, that make a distinction in cases of contracts predicated of a violation of the revenue laws, and especially that class of them which does not expressly declare the contract to be void. The case of Aiken v. Blaisdell, 41 Vt. 655, is a strong case going to sustain a contract of sale contrary to law. We prefer, however, to stand by our own decisions. The case of Maybin v. Coulon, *supra,* was based upon a violation of the revenue laws of the United States, and the unbroken current of authorities in this state is to hold a contract void which is grounded upon a clear violation of a statute, although it may not be expressly so declared by its terms.

Judgment affirmed.[1]

[1] Compare Cooper v. Griffin, 13 Ind. App. 212.

Statutes in most states provide that it is unlawful for any one to retail drugs or to compound prescriptions without a license. See Mass. Rev. Stat. (1902), Chap. 76, §§ 10–23; Mo. Annot. Stat. (1906), Chap. 23.

CHAPTER III.

SUBJECT-MATTER OF AGENCY.

Section 1.—What Acts can be done by an Agent.

IN re LONDON AND MEDITERRANEAN BANK.
Ex parte BIRMINGHAM BANKING COMPANY.

1872. Court of Appeal in Chancery. L. R. 7 Ch. App. 651.

At an extraordinary meeting of the London and Mediterranean Bank Limited, held on the 2nd of November 1867, resolutions were passed for winding up the company voluntarily, and Messrs. Maxwell, Rouse, Collins and Scholefield were appointed liquidators. At the first meeting of the liquidators, held on the 14th of November at which all four liquidators were present, a resolution was passed by them that the bankers of the company be requested to honor all checks or drafts bearing the signature of one of the liquidators, members, or secretary countersigned by the accountant or one of the cashiers of the company, and that the bank's acceptances should continue to be signed by one of the liquidators and by the manager or directors.

The Birmingham Banking Company were the holders of five bills of exchange drawn at different dates since the winding up and by different persons and each accepted by one of the four liquidators and the manager "for the London and Mediterranean Bank, Limited, in liquidation." The Birmingham Banking Company claimed to be entitled to debt from the estate in respect of these five bills.

The liquidators had been arranged where the bills were accepted, and the present liquidators disputed the claim of the Birmingham Banking Company on the ground that the bills had been accepted by the liquidators only formed to two, as required by the Companies Act, 1862, power to accept bills being given by the eighty-fifth section of the act.

It appeared that the original liquidators had passed a resolution that bills to the extent of £100,000 should be issued to a Mr. Price, and Mr. Dingwall seemed to have taken these five bills of exchange to have put cash thereunder. There was a dispute as to

CHAPTER III.

SUBJECT-MATTER OF AGENCY.

Section 1.—What Acts can be done by an Agent.

In re LONDON AND MEDITERRANEAN BANK. Ex parte BIRMINGHAM BANKING COMPANY.

1868. Court of Appeal in Chancery. L. R. 3 Ch. App. 651.

At an extraordinary meeting of the London and Mediterranean Bank, Limited, held on the 22d of November, 1865, resolutions were passed for winding up the company voluntarily, and Messrs. Maxwell, Routh, Collins and Schoales were appointed liquidators. At the first meeting of the liquidators, held on the 24th of November, at which all four liquidators were present, a resolution was passed by them that the bankers of the company be requested to honor all checks or drafts bearing the signature of one of the liquidators, manager, or secretary, countersigned by the accountant or one of the cashiers of the company, and that the bank's acceptances should continue to be signed by one of the liquidators and by the manager as theretofore.

The Birmingham Banking Company were the holders of five bills of exchange drawn at different dates since the winding up, and by different persons, and each accepted by one of the four liquidators and the manager "for the London and Mediterranean Bank, Limited, in liquidation." The Birmingham Banking Company claimed to be creditors for £4667 10s., in respect of these five bills.

The liquidators had been changed since the bills were accepted, and the present liquidators disputed the claim of the Birmingham Banking Company on the ground that the bills had been accepted by one liquidator only instead of two, as required by the Companies Act, 1862, power to accept bills being given by the ninety-fifth section of the act.

It appeared that the original liquidators had passed a resolution that bills to the extent of £16,500 should be issued to a Mr. Dimsdale, and Mr. Dimsdale seemed to have taken these five bills of exchange and to have got them discounted. There was a dispute as to

whether these bills were issued for the purposes of the liquidation or for other purposes, as to which some evidence was entered into.

The vice-chancelor Stuart was of opinion that the Birmingham Banking Company had established their claim, and he made an order that their claim in respect of the said five bills of exchange should be allowed.

The official liquidators appealed.

Mr. Bacon, Q. C., and Mr. J. N. Higgins for the appellants:

We reply on the statutory requisitions, and contend that these bills are invalid, as being signed by one liquidator only. The company at the meeting could authorize one liquidator to act, but the liquidators could not. It is clear on the face of the bills that the company was in liquidation, and any one taking them is bound to know that one liquidator could not bind the company. There is no distinction between this case and the case of a claim by the London and South Western Bank against this very company, where the vice-chancellor decided against the claim.

Mr. Swanston, Q. C., and Mr. Lindley for the Birmingham Banking Company:

Our claim is that of creditors holding these bills as security. We advanced the money and took the bills signed by one liquidator. There is nothing in the act to make such an acceptance invalid. Lord v. Hall, 8 C. B. 627 (E. C. L. R., Vol. 65). It does not signify who actually signs the bills if the signer has the authority of all the liquidators. A clerk may sign. *Ex parte* Sutton, 2 Cox 84. The Vice-Chancellor Stuart was of opinion that we had advanced this money; and the words as to the bills of exchange must have been inadvertently introduced into the order.

Mr. Higgins, in reply.

Sir W. Page Wood, L. J.—

The point now before us is this, and it does not seem to be unimportant to the liquidators of the Mediterranean Bank: namely, whether the proof should be upon the bills or upon the debt?

Now, as regards the claim upon the bills, the case stands in a very small compass, and it is this: According to the Act, liquidators, when they are in the plural number, cannot perform any act except there be two at least engaged in the performance of that act, unless they have authority from the company appointing the liquidators to perform it in any other manner—as for example, through the medium of one liquidator. Then the ninety-fifth section gives power to liquidators to accept bills of exchange, which shall bind the company. That power is simply a statutory power; and the liquidators have no power whatever, except by the statute, and, of course, therefore, that power must be exercised as the statute directs; that is to say, the liquidators in this case have no power to accept bills except through the medium of two, at least, of them.

I am disposed to accede to the very able argument of Mr. Swan-

ston and Mr. Lindley, and I am not at all inclined to dispute their proposition, that the authority of the two does not necessarily mean that you should find the names of the two liquidators on the piece of paper which forms the bill. But though the liquidators might well meet (the four liquidators are said to have done so here) and give an authority to some one, yet that must be as to the acceptance of a specific bill, or other specific thing which is to be done; and they may then say that their clerk or agent, whoever it may be, shall sign for them; or, it may be, impress a printed mark, which may be taken to be their signature. That may be a good acceptance under the 95th section; but at least you must have the judgment of the two liquidators upon the particular bill which they authorize to be so signed; and I apprehend that a general resolution that all these bills should be signed in a particular way could go no farther than Mr. Lindley put it, that when they have exercised their judgment, and desired that a particular bill shall be accepted, that shall be the way in which it shall be done. [The lord justice then commented on the evidence, and continued.] The grant of a sweeping authority to issue bills, altogether to the extent of £16,500, without any judgment exercised as to the date at which they are to be issued, the proportions in which they are to be issued, the amount of the bills, or the times during which they shall run, except this, that there are to be three months from the date, whenever that may be, does not appear to us an act which it was competent to the four liquidators to do in the manner proposed by their resolution.

As regards the holders of the bills, it may be said that they are placed in a disadvantageous position, in being affected by any of these regulations with reference to the acceptance of bills; but I apprehend that the holders of the bills must be bound by the statute. It may always be a question how far they are bound by the private regulations of the company's deed, but here is an express provision in the statute which tells them that a single liquidator cannot accept—that is to say, he cannot be the person authorizing an acceptance. Therefore, if the holder finds on the face of the bill no trace of the requisite authority, it is his own fault if he takes a bill of that description, and the *onus* is then thrown upon him of showing that the statute has been complied with. We think that that *onus* has not been in this case discharged, and that the decision of the vice-chancellor in the case of the London and South Western Bank was a perfectly correct decision on the circumstances there stated, which seem to have been very similar in substance to the circumstances here. Our order will be wholly without prejudice to the question whether or not the claimants are entitled to recover the money which may have been advanced to the bank at the instance of the liquidators; that is quite another question, but the order of the vice-chancellor, in its present form, cannot stand, and will be discharged. All we do is to discharge the vice-chancellor's order, without prejudice to any proof that may

be made by the Birmingham Bank in respect of moneys advanced to the bank in liquidation; the liquidators to have their costs of this appeal out of the estate; and the costs of the respondents of this appeal to depend upon the result of the proof they may offer in respect of the moneys advanced.[1]

CROW v. CARTER.

1892. Appellate Court of Indiana. 5 Ind. App. 169.

Reinhard, C. J.—Action by the appellees against the appellant on a subscription paper, by which Crow promised to pay Carter one hundred dollars for the purpose of piping gas from a certain well to a point where it could be used by these parties and other citizens of the community. The contract was afterward assigned by Carter to the appellees. There was an answer of *non est factum*. Upon trial in the court below the appellees recovered.

No question is made as to the consideration, nor is it denied by the appellant that he agreed to the contract as embodied in the written instrument declared upon. He admits that he authorized Carter to sign his name to the paper, but claims that such signature was invalid and not binding on him.

Numerous authorities are cited by appellant's learned counsel in support of the contention that an agency cannot be assumed by one of two contracting parties for the other, and it is urged with considerable force and earnestness that these authorities declare that one of such contracting parties cannot validly place the signature of the other to the contract, even at his request and in his presence. We have examined the authorities relied upon and our conclusion is they do not apply to a case like the one here presented. They have reference, almost entirely, to cases coming within the purview of the statute of frauds, and but express in different forms the familiar rule that where a written instrument is necessary to the validity of a contract, under the statute, one of the contracting parties may not be the other's agent, even for the purpose of signing the contract. No question arises here under the statute of frauds. The act of signing

[1] The concurring opinion of Selwyn, L. J., is omitted.

Cited and approved in *Ex parte* Agra Bank, L. R. 6 Ch. 206.

"Also there are some things personal, and so inseparably annexed to the person of a man, that he cannot do them by another, as doing of homage or fealty. So it is held in 33 E 3, Trespass 253, the lord may beat his villain for cause, or without cause, and the villain shall not have any remedy; but if the lord commands another to beat his villain without cause, he shall have an action of battery against him who beats him in such case." Combe's Case, 9 Co. 75a, 76.

Regarding the question whether an agent can be given authority to answer interrogatories on oath, see Dickson v. Morgan, 7 La. Ann. 490.

the appellant's name was but a mechanical performance, and the appellant had a right to avail himself of the services of the appellee for that purpose, as much as he would that of a stamp or other instrument he might choose to employ. There is no pretense that Crow did not agree to the contract as stated in the instrument sued upon.

The act of affixing the appellant's signature was not required to be done by some disinterested person as in the case of executing by an agent a contract under the statute of frauds. Here the signature was written in the presence and at the direction of the party to be charged, and where such is the case the act is regarded as that of the party himself. Croy v. Busenbark, 72 Ind. 48. The contract, moreover, was complete when the minds of the parties had met and accepted the instrument as embodying the terms of their agreement. The act of signing may be performed in many ways and be valid, and the instrument may be binding, if accepted by the parties, though not signed at all. Not so with respect to contracts that fall within the statute of frauds. These are required to be in writing and signed by the party to be charged therewith, "or by some person thereunto by him lawfully authorized." Section 4904, R. S. 1881, *et seq.* The signing of a contract not within the statute, such as the one in suit, is but an evidence of its acceptance as such contract, and the signature is not essential to its validity.

Judgment affirmed.

Crow having died before the date of submission, William Walker, his executor, was substituted as appellant, and it is adjudged that said executor pay the costs of this appeal out of the assets of said Crow's estate.

RICE v. WOOD.

1873. Supreme Judicial Court of Massachusetts.
113 Mass. 133.

A broker acting for both parties in effecting an exchange of property can recover compensation from neither, unless his double employment was known and assented to by both.

Contract to recover a broker's commission. At the trial in the central district court of Worcester it appeared that the defendant employed the plaintiffs to exchange his stocks for real estate, and that he agreed to pay them a commission therefor; that at this time the plaintiffs were also employed by other parties to sell or exchange their real estate; that the plaintiffs introduced the defendant to these parties, and through the plaintiffs' instrumentality the defendant's stock was exchanged for the real estate. There was evidence that the plaintiffs were employed and acted as brokers for both parties in this exchange; that they were to receive, and did receive from the

owners of the real estate a commission for disposing of it; that the defendant knew at the time he employed them and agreed to pay them a commission that they were employed by the owners of the real estate to dispose of it, and that they were to receive a commission from them, but that the other parties did not know that the plaintiffs were employed by the defendant, or that they were to receive a commission from him for disposing of the stock.

The defendant asked the court to instruct the jury that if a broker acts for both parties in effecting a sale or exchange of property, he cannot recover compensation from either of the parties, unless both parties knew and assented to his acting for both.

The court refused to give the instruction prayed for, but did instruct the jury as follows: "If the plaintiffs were employed by the defendant as brokers to exchange his stock for real estate, and he was informed by them, or had knowledge, that they were to make the exchange with persons whose estates had been left in their hands for exchange or sale, and that they were to receive commissions from those persons for disposing of their estates, and that with this knowledge the defendant agreed to pay the plaintiffs a commission for making the exchange, the fact that the plaintiffs were employed by and were to receive a commission from the other parties would not in itself defeat the plaintiffs' claim."

Devens, J. In this case there was evidence at the trial in the court below that the plaintiffs had been employed by a third person, who had promised to pay them a commission therefor, to dispose of certain real estate, and that afterward, without the knowledge of such person, an agreement was made between the plaintiffs and the defendant, by which the plaintiffs were employed to act for the defendant in the exchange of certain stocks held by him for real estate, and were promised a commission if such exchange should be effected, the defendant knowing at the time that the plaintiffs were employed for a commission to sell such real estate; and further that afterward the plaintiffs introduced the defendant to the owner of such real estate, and by the instrumentality of the plaintiffs the exchange of defendant's stock for such real estate was effected.

If this were an action by the plaintiffs against the owner of the real estate, for commissions earned in disposing thereof, the decision of this court in Farnsworth v. Hemmer, 1 Allen 494, would be conclusive against the claim, upon the ground that the plaintiffs, if such facts should be proved, had entered into a relation inconsistent with the confidence reposed in them by such owner, and placed themselves in a position antagonistic to his interests. This case presents, however, the question whether, conceding that the plaintiffs could not recover their commissions from the owner of the real estate, they may not recover those they claim to be entitled to from the defendant, as he knew fully, at the time of entering into his contract, the relation in which the plaintiffs stood to the third party.

It was no duty of the plaintiff to get the license paid for the real estate that could be obtained for it in the market; that is a matter between the plaintiffs and the Government, and it was the duty of the plaintiffs to collect a sale to the defendant, even if it was one [illegible] from [illegible] having been made [illegible] they merely secured their foundation. [illegible] It was therefore an agreement which placed the plaintiffs under the obligation to sell [illegible] with the [illegible] [illegible] Wallace v. Cresswell, 16 Mass. 256.

Contracts which are opposed to good morals are not binding, and cannot be enforced in courts of justice. A contract to obtain an appointment to office, for pecuniary consideration, cannot be legally enforced. If the plaintiffs were [illegible] to procure the defendant's appointment to office, and the defendant promised to pay them a sum of money for their services, and the plaintiffs did procure the appointment, and the defendant refused to pay, the plaintiffs could not recover the money. Such a contract is void, as against public policy, and the law will not enforce it. Oliver v. Liverpool, 3 Mass. 428.

A contract to procure a pardon for a criminal, for a pecuniary consideration, is void, as against public policy, and the law will not enforce it. Hall v. Hollander, 4 B. & C. 660.

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It was the duty of the plaintiffs to get the highest price for the real estate that could be obtained for it in the market; while the contract between the plaintiffs and the defendant was an inducement to the plaintiffs to effect a sale to the defendant, even if it was on lower terms than might have been obtained from others, because they thereby secured their commissions from both parties. It was therefore an agreement which placed the plaintiffs under the temptation to deal unjustly with the owner of the real estate. Walker v. Osgood, 98 Mass. 348.

Contracts which are opposed to open, upright and fair dealing are opposed to public policy. A contract by which one is placed under a direct inducement to violate the confidence reposed in him by another is of this character. If the plaintiffs were guilty of injustice to the owner of the real estate, by placing themselves under an inducement to part with it at less than its full market value, they should not be allowed to collect the promised commissions on the sale of the stock, which was the consideration for which they put themselves in such a position. No one can be permitted to found rights upon his own wrong, even against another also in the wrong. A promise made to one in consideration of doing an unlawful act, as to commit an assault or to practice a fraud upon a third person, is void in law; and the law will not only avoid contracts, the avowed purpose or express object of which is to do an unlawful act, but those made with a view to place, or the necessary effect of which is to place, a person under wrong influences, and offer him a temptation which may injuriously affect the rights of third persons. Nor is it necessary to show that injury to third persons has actually resulted from such a contract, for in many cases where it had occurred this would be impossible to be proved. The contract is avoided on account of its necessarily injurious tendency. Fuller v. Dame, 18 Pick. 472.

We are of opinion, therefore, that the judge who presided at the trial erred in the instruction given, and that the defendant was entitled to an instruction substantially like that asked for. Nor can the ruling be sustained upon the ground suggested at the bar, that the plaintiffs were middlemen only, bringing the parties together and doing nothing further, the parties themselves making the contract. In Rupp v. Sampson, 16 Gray 398, the plaintiff was permitted to recover, not for services rendered to the defendant as a broker, but for the performance of a certain specific act, namely, the introduction of the other party to him, the parties after such introduction making their own contract. It was there held that this was not such a fraud upon the other party, who also paid for the service of the plaintiff in introducing him, although concealed from such party, as to make the contract of the plaintiff with the defendant void for illegality. That, however, is not the present case. It here appears, by the bill of exceptions, not only that there was evidence that the

plaintiffs introduced the parties, but that, through the instrumentality of the plaintiffs, the exchange was effected, and that in effecting such exchange the plaintiffs acted as brokers for both parties. It is to be observed also, that both the instructions asked for by the defendant and those given by the presiding judge proceed upon the ground that the plaintiffs were brokers, and not middlemen only.

Exceptions sustained.[1]

COX v. HAUN.

1890. Supreme Court of Indiana. 127 Ind. 325.

Elliott, J. This case has been twice tried, and the result in each instance has been against the appellant. He asks a reversal upon the ground that the trial court erred in denying him a new trial.

The point is made that the verdict is not sustained by the evidence, and, in support of this point, it is urged that the evidence fails to establish a fact essential to a recovery. The fact which it is said is not proved is that the appellant did not have knowledge that the appellee was acting for the parties in making an exchange of real estate. To understand the question it is necessary to outline the facts. The appellee was a real estate broker, and had in his hands for sale a farm belonging to Avery Fish. The appellant asked the appellee if he had a farm which he could exchange for property in the city of Lebanon, and this opened the negotiations which led to the exchange of property. After several interviews the two owners were brought together, and an exchange effected, the owners fixing the terms of the exchange. The meeting took place in the appellee's office, and the terms of the exchange were there agreed upon by the owners themselves without any suggestions as to terms from the broker. The appellee, in his testimony, says that the owners "knew that he was acting as agent for them both," and he also testifies that the appellant agreed to pay him a commission of one and a half per cent. This evidence fully sustains the verdict. It is probable that without any direct testimony showing that the appellant knew that the broker was acting for the other party to the exchange the fact that he was so acting would be necessarily inferable from the fact that the appellant knew the business in which the appellee was en-

[1] "I entertain no doubt, however, that when a bribe is given, or a promise of a bribe is made, to a person in the employ of another, by some one who has contracted, or is about to contract, with the employer, with a view to inducing the person employed to act otherwise than with loyalty and fidelity to his employer, the agreement is a corrupt one, and is not enforceable at law, whatever the actual effect produced on the mind of the person bribed may be." Cockburn, C. J., in Harrington v. Victoria Graving Dock Co., L. R. 3 Q. B. D. 549, 551.

good, and knew that he already had in his hands as broker, the property of the other party to the contract of exchange.

If an owner goes to a broker and promises to pay him a commission for finding an exchange with another owner who has already employed the broker, it is no more than reasonable to infer that he does so with knowledge that if the brokers rendered services to both parties he will expect compensation from both of them.

It is a mistake to suppose that an ordinary real estate broker occupies the same position as an agent employed to buy or sell specific property, for such a broker is generally a middleman, employed to bring the principals together, and give them an opportunity to effect an exchange or property. Pierce v. Wright, 120 Ind. 362; Vinton v. Baldwin, 88 Ind. 104; McCauley v. North Western Christian University, 97 Ind. 267; Reeve v. Stevens, 97 N. Y. 141; Simpson v. Thompson, 10 Grey (106 Mass.) 476; Barry v. Schmidt, 27 Mo. App. 1; Lee v. 217; Stevens v. Hollis, 22 Wis. 344; Herman v. Matthews, 1 Wis. 236. If the broker is guilty of fraud, or if he takes any advantage of his position as the agent of his principal, he cannot receive commissions; but where, as here, he acts in good faith, brings the principals together to his own office, and does make their own bargain, untrammeled by any representations of his, he is entitled to compensation.

The trial court did not err in refusing the motion for a new trial upon the ground of newly-discovered evidence, as mentioned.

Judgment affirmed.[1]

Section 2.—Contract of Appointment for Illegal Purpose.

CRIPPINGER v. HEPBAUGH.

(1894. Supreme Court of Pennsylvania. 5 Watts and Serg. 162.)

This was an action on a written agreement in which defendant (Crippinger) promised to pay the plaintiff (Hepbaugh) one hundred dollars on condition that he should procure a certain law or interest in the determination to be enacted by the legislature of Pennsylvania. Hepbaugh, having succeeded in having said law enacted,[2]

Rogers, J.: The principle which has generally obtained in this state is that a contingent compensation for legal services has been a

[1] "As agent or broker employed to purchase for an undisclosed owner because the seller will not treat in the premises. If anything is communicated with which, were the party the agent of another, inquiries would be made of whom the party he would not authorize, together he will not treat to negotiate, when I can be, then and if they change my mind then the matter is at an end, for I have not disclosed to the principal." Cobb, J., in Cockburn v. Thompson, 16 Ill. 322, 326.

[2] The reporter's statement of facts is omitted.

gaged, and knew that he already had in his hands, as broker, the property of the other party to the contract of exchange.

If an owner goes to a broker and promises to pay him a commission for effecting an exchange with another owner who has already employed the broker, it is no more than reasonable to infer that he does so with knowledge that if the broker rendered service to both parties he will expect compensation from both of them.

It is a mistake to suppose that an ordinary real estate broker occupies the same position as an agent employed to buy or sell specific property, for such a broker is generally a middleman, employed to bring the principals together, and give them an opportunity to effect an exchange of property. Pape v. Wright, 116 Ind. 502; Vinton v. Baldwin, 88 Ind. 104; Alexander v. North Western Christian University, 57 Ind. 466; Rowe v. Stevens, 53 N. Y. 621; Rupp v. Sampson, 16 Gray 398; Barry v. Schmidt, 27 Alb. L. J. 297; Stewart v. Mather, 32 Wis. 344; Herman v. Martineau, 1 Wis. 136. If the broker is guilty of fraud, or if he takes any advantage of his position to the injury of his principal, he cannot recover commissions; but where, as here, he acts in good faith, brings the principals together in his own office, and they make their own bargain, uninfluenced by any representations of his, he is entitled to compensation.

The trial court did not err in treating the showing for a new trial upon the ground of newly-discovered evidence, as insufficient.

Judgment affirmed.[1]

Section 2.—Contract of Appointment for Illegal Purpose.

CLIPPINGER v. HEPBAUGH.

1843. Supreme Court of Pennsylvania. 5 Watts and Serg. 315.

This was an action on a written agreement in which defendant (Clippinger) promised to pay the plaintiff (Hepbaugh) one hundred dollars on condition that he should procure a certain law, of interest to the defendant, to be enacted by the legislature of Pennsylvania, Hepbaugh having succeeded in having said law enacted.[2]

Rogers, J. The practice which has generally obtained in this state, to allow a contingent compensation for legal services, has been a

[1] "An agent or broker employed to purchase for his principal cannot become the seller without notice to the principal. If appellees, as commission merchants, were employed by appellants to go upon the market and buy for them a certain quantity of wheat for cash, this would not authorize appellees to turn over to appellants wheat held by them, even if they charged no more than the market price, unless the fact was disclosed to the principals." Craig, J., in Tewksbury v. Spruance, 75 Ill. 187, 188.

[2] The reporter's statement of facts is condensed.

subject of regret, nor am I aware of any direct decision by which the practice has received judicial sanction in our courts. But conceding the principle to be as is assumed, it is very certain that it has not yet been extended to the allowance of a compensation for services in our legislative halls. The point, therefore, comes before us, untrammeled either by inveterate practice or authoritative decisions. Such services, be it remembered, are not confined to the legal profession. They are common to every class of citizens, and if we should give countenance and a legal sanction to this attempt, which is the entering wedge, it is impossible to foretell the train of evils of which it may be the prolific parent. Already is there too much reason to believe that this indispensable branch of government, without which our whole political fabric would crumble into ruins, has in some instances been contaminated by sinister and improper influences brought to bear on members, and no doubt having their source in the direct and indirect efforts of individuals retained under the hope of reward in the event of success. It cannot be avoided that such influences, privately and secretly exerted under false and covert pretenses, must operate deleteriously on legislative action; and of this truth, unfortunately, our annals (I do not speak of this state alone) have afforded some melancholy proofs. There is at least a wide-spread and growing suspicion of legislative integrity, which of itself is an evil of no little magnitude. Its pernicious tendency seems to be admitted as to public bills, but a distinction is taken between them and private acts. That the latter may not prove so pernicious as the former (of which, by the bye, I am by no means satisfied), may be conceded without danger to the argument; but the principle, with which alone we have to do, is the same. When it is recollected that, with the rapid increase of wealth and population, such acts have greatly multiplied, and have assumed an importance before unknown; and when it is remembered (with all due respect be it spoken) that comparatively so little care is taken in the preparation of private bills, or in giving notice to persons interested in the examination of the evidence on which they are founded, that the information of members is derived, altogether or in part, from the applicant himself, and the secret whisperings of his friends, we cannot be too much on our guard against them, nor insist too strongly on the necessity of preserving, as far as can be done, the source from which the evidence on which they act is obtained. It would not be becoming in us to lend our aid in a transaction which may be founded in corruption, and steeped in fraud.

These remarks are not to be understood as having any relation to the case in hand, for no suspicion is entertained that anything out of the ordinary course took place in respect to this bill. Yet it cannot escape observation that even here an inducement was not wanting to an improper, or at least personal influence, or deceptive acts, to procure the success of the measure. The temptation may be

small here, but it has not always been confined within such narrow limits, as there is great reason to fear. We do not say, it is not necessary to the case to say, that a certain compensation for such services may not be recovered; but we are clearly of opinion that it would be against sound policy to sanction a practice which may lead to secret, improper and corrupt tampering with legislative action. It is not required that it tends to corruption; if its effect is to mislead, it is decisive against the claim; and that such is its tendency, no human being can reasonably doubt. In Hatzfield v. Gulden (7 Watts 152), it is decided that a contract, founded on a promise and agreement to procure signatures and obtain a pardon from the governor, is unlawful, and cannot be enforced by action. This case is very pertinent, for if it is essential to the purity of the government to protect the governor from imposition in the exercise of the executive functions, it is equally so to extend the same protection to the members of the legislature. It is of the first consequence that they should not be deceived, that they should be protected from the arts and misrepresentations of designing men, having an interest to mislead them from the paths of duty.

It is therefore most erroneous to assume, as is done by the plaintiff's counsel, that a practice, leading to such consequences, is not contrary to private interest and public morals. The reverse is too true; for already has a class of persons arisen, at the seat of the general government and elsewhere, who make it a business to push through private claims, for a compensation greatly, if not entirely, dependent on success. How demoralizing this may be, it needs not the gift of prophecy to foretell. Nay, more; we feel its effects, for it is impossible to shut our eyes at the consequences of this, with other causes, daily developing themselves in the decline of justice and public morals. How easy the transition from private individuals to the members themselves, it would not be difficult to divine; but we are not left to conjecture, for we are not without examples, which it would be invidious to mention, but which are too well known. Whatever abuses may exist elsewhere, we hope the judicial tribunals of the country may be kept pure, without suspicion even, that they may never be induced under a pretense to countenance vice, or lend their sanction to a principle, the inevitable effect of which will be to increase, if it does not create, fraud and misrepresentation. In the face of many painful examples to the contrary, it is idle to say that individual, extraneous influence, acting secretly upon the members of the legislature, is not pernicious to the best interests of society. Its direct tendency is to sap the foundations of all morality. And we are not without authority in a sister state, 6 Dana 366, where this point has been considered. The court, it is true, decided in favor of the plaintiff; but it was on the special grounds, that it did not appear that the fee was contingent, nor that the plaintiff was expected or required to do anything he might not lawfully have done,

or that he had any personal or pecuniary interest in the success of the application to the legislature.

The whole reasoning of the court, however, goes to establish these propositions, which cannot be reasonably denied. That the law will not aid in enforcing any contract that is illegal, or the consideration of which is inconsistent with public policy and sound morality, or the integrity of the domestic, civil or political institutions of a state. That a contract to procure or endeavor to procure the passage of an act of the legislature, by any sinister means, or even by using personal influence with the members, would be void, as being inconsistent with public policy and the integrity of our political institutions. And any agreement for a contingent fee, to be paid on the passage of a legislative act, would be illegal and void, because it would be a strong incentive to the exercise of personal and sinister influences to effect the object. These are broad fundamental principles, to the truth of which we subscribe, and which cover the whole ground on which this case rests. It matters not that nothing improper was done or was expected to be done by the plaintiff. It is enough that such is the tendency of the contract, that it is contrary to sound morality and public policy, leading necessarily, in the hands of designing and corrupt men, to improper tampering with members, and the use of an extraneous, secret influence over an important branch of the government. It may not corrupt all; but if it corrupts or tends to corrupt some, or if it deceives or tends to deceive or mislead some, that is sufficient to stamp its character with the seal of reprobation before a judicial tribunal.

Two cases have been cited, adverse, as is supposed, to this view of the case: The Vauxhall Bridge Co. v. Earl Spencer (4 Con. E. C. R. 28), Jacob 64; 10 Ib. 85, 7 Simons 337. In the first, it is ruled that securities given to persons who would be prejudiced by the passage of a private bill in parliament, in consideration of their withdrawing their opposition to it, are not illegal. In the last, that an agreement not to oppose a railway is not illegal. The projectors of a railway, pending a bill in parliament for incorporating them, having made an agreement on behalf of the proposed corporation, in consequence of which a threatened opposition to the bill was withdrawn, it was held that the corporation, having received the benefit of the agreement, was bound by it. The last case was ruled on the authority of the first; and if it was the case of a secret agreement, withheld from the knowledge of the committee to whom the subject was committed, I cannot say that I am altogether satisfied with the decision. Nor do I see much force in the observation, that because only one member may have been dissatisfied with the bill, *non constat* it would have had any influence on the house. But, be this as it may, it is put upon special grounds, that it was merely an agreement to compensate the opposing party for what it was apprehended they might lose by the passage of the act; and if it were a private affair merely,

in which the public had no interest, it might be well enough. Reliance was also had, as it seems, on a practice which obtains in parliament, of passing such bills when the parties can agree about them. The chancellor seems to have thought that it was a matter in which the public had no interest, that it was neither against sound morality nor public policy. And if he is right in these positions, his conclusions cannot be gainsaid. But in this radical distinction consists the difference of the cases.

Besides, it would be unsafe to rely on a precedent coming from such a source, when we reflect upon the different manner of conducting such business in the respective countries. The contrast is indeed striking. In England, a private act of parliament is in the nature of a common assurance, and the passage of such an act is conducted in some measure with the forms and circumspection of a judicial proceeding. In this state it is notoriously otherwise. In both houses, in England, they are carried on with great deliberation and caution, particularly in the house of lords; they are usually referred to two judges, to examine and report the facts alleged, and to settle all technical forms. Nothing is done without the consent, expressly given, of all parties in being, and capable of consent, that have the remotest interest in the matter, unless such consent shall appear to be perversely, and without reason, withheld. An equivalent in money, or other estate, is usually settled upon infants, or persons not *in esse*, or not of capacity to act for themselves, who are to be concluded by the act. And a general saving is constantly added, at the close of the bill, of the right and interest of all persons whatsoever, except those whose consent is so given and purchased, and who are therein particularly named. And yet, notwithstanding all the precautions used, alarm has been felt at the frequency of acts of parliament of a private nature, lest the good old rules which are the best security for property should be shaken; and wishes have been expressed from the highest quarter, that men might not have too much reason to fear that the settlements which they make of their estates shall be too easily unsettled, when they are dead, by the power of parliament.

If there is reason to fear this in England, how much more so in this state, where but little precaution is used—where, not unfrequently, such acts are passed with but little examination, on the private representations of persons who have a direct interest to misrepresent and deceive. And of the danger to property arising from this source, this case presents a proof; for it is certain that this act, and others that might be named, so loosely drawn, containing so little security for the rights of infants, would not have passed the parliament of England, nor the legislature of this state, if properly conned and scrutinized, without the assent or even hearing of the parties principally to be affected by it. I say without the hearing of the infants, for I count but little the assent of the parent who had an interest

adverse to them. It is remarkable, too, that the bill passed without any saving clause, which, although not absolutely necessary, yet would have shown some regard to the rights of persons who were not in a capacity to protect themselves.

Judgment reversed, and judgment for defendant.[1]

ELKHART COUNTY LODGE v. CRARY.

1884. Supreme Court of Indiana. 98 Ind. 238.

Elliott, C. J.—The material facts of this case are these: In October, 1878, the post-office in Goshen was kept in a room not affording suitable accommodations for the public, and there was a necessity for its removal. The postmaster was required by the government to furnish a room for the office and the rent was payable out of his salary. The value of adjacent property was enhanced by the location of the post-office and its rental value increased. The citizens of Goshen requested that the location of the office should be changed, and thereupon a competition arose between property owners of two localities, and property owners on Main street made a proposition to the department that they would furnish a suitable building for the office, and this proposition was made known to the appellants who were property owners on Market street, and were desirous of having the post-office located on that street. The appellants were the owners of a brick building on Market street, in course of erection, which was suitably located for the post-office; the appellee was the owner of real estate in the vicinity of appellants' building and was desirous of having the post-office located near his property. The appellants proposed to the appellee and other property owners, that they would fit up a room in their building with all suitable conveniences and equipments for a post-office and tender it to the government, rent free or for a nominal rent for ten years, on condition that the post-office should be maintained in the room for that period. A verbal preliminary agreement was made, wherein the property owners agreed that they would each pay to the appellants a certain sum yearly for ten years, provided the appellants would propose to the government to

[1] *Accord:* Mills v. Mills, 40 N. Y. 543.

"The principal question here presented is, was the contract entered into between the plaintiff and defendant void, as against public policy? And that turns on whether it embraces, by its terms or by necessary implication, an agreement to do an illegal act or to resort to secret or improper tampering with official action, either legislative or otherwise, to effect the purposes of the agreement, or that such was its tendency. If, by its terms, or by necessary implication, the agreement stipulated for corrupt action or personal solicitation in the nature of lobbying, or tended directly to such results, it is void." Marshall, J., in Houlton v. Nichol, 93 Wis. 393, 396.

yield their room for a post-office at a nominal rent for ten years, and that "they would use all proper persuasion to secure the location of the post-office in their room." The notes in suit were executed pursuant to this agreement, and for the consideration therein specified. One of the appellants was a personal friend of the postmaster general, and represented to that officer that the location was a suitable one, and urged upon him the propriety of placing the office in appellants' building. The representation that the location was a suitable one was true. The proposition made by the appellants was accepted by the government, and the nominal rent of $12 per annum was agreed upon, and the room leased for a period of ten years for a post-office.

The material deduction of law from these undisputed facts is that the parties formed a conspiracy for the purpose of securing the location of a public office, and as part of the plan the appellants undertook that certain individuals of their number should use their influence with the government officers to effect the purpose of the combination, and that the agreement to pay for such services was contingent upon the success of the scheme.

It has long been established that a contract against public policy will not be enforced. This principle is firmly fixed and has often been applied to contracts. There can therefore be no doubt as to the existence of the rule; the only question is as to its application in the facts of this case.

While the general public has no interest in the location of an office, a railroad station, or the like, a contract to secure its location at a particular place is held to be against public policy and not enforceable. There are very many cases holding that an agreement to locate a railroad station at a designated place is not enforceable because against public policy. St. Louis, etc., R. R. Co. v. Mathers, 109 Ill. 257; Williamson v. Chicago, etc., R. R. Co., 55 Iowa, 130, 7 N. W. 491, and the authorities there cited. The principle on which these cases proceed is that the public good, and not private interest, should control in the location of railroad depots, and this principle certainly applies with full force to an office of a purely public character, such as a post-office. We find in these railroad cases, and there are very many of them, a principle which supplies a rule governing such a case as the present. It is true that there is some difference in the views of the courts upon the question whether an agreement for the location of a depot or relief when it does not restrict the location to the place named, and no other, but upon the general principle there is entire harmony. In the present case the difference in the opinions of the courts is an unimportant consideration, for here the location is restricted to one place and to others for a period of ten years, and the case therefore falls within the holding of the cases most favorable to the appellants. We can view the location as restricted to one place for the whole term, a matter of indifference, but that the agreement can be treated as the act of Gordon. While the cases

yield their room for a post-office at a nominal rent for ten years, and that "they would use all proper persuasion to secure the location of the post-office in their room." The notes in suit were executed pursuant to this agreement, and for the consideration therein specified. One of the appellants was a personal friend of the postmaster general, and represented to that officer that the location was a suitable one, and urged upon him the propriety of placing the office in appellants' building. The representation that the location was a suitable one was true. The proposition made by the appellants was accepted by the government and the nominal rent of $12 per annum was agreed upon, and the room leased for a period of ten years for a post-office.

The material deduction of fact from these subsidiary facts is that the parties formed a combination for the purpose of securing the location of a public office, and as part of the plan the appellants undertook that certain individuals of their number should use their influence with the government officers to effect the purpose of the combination, and that the agreement to pay for such services was contingent upon the success of the scheme.

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of which we have spoken establish a principle which rules this case, there are others which, in their general features, more nearly resemble the one at bar. Closely analogous in principle are those cases which hold that contracts which may tend to the injury of the public service are void. Card v. Hope, 2 B. & C. 661; Wells v. Foster, 8 M. & W. 149; Blachford v. Preston, 8 T. R. 89; Tool Co. v. Norris, 2 Wall. 45; Ashburner v. Parrish, 81 Pa. St. 52.

There are many phases of injury to the public service, and we do not deem it necessary to examine the cases upon the subject, for we think it quite clear that a contract which is made for the purpose of securing the location of an important office connected with the public service for individual benefit, rather than for the public good, tends to the injury of the public service. The case made by the evidence falls fully within the principle that contracts which tend to improperly influence those engaged in the public service, or which tend to subordinate the public welfare to individual gain, are not enforceable in any court of justice. Pollock Prin. of Cont. 279; Anson Cont. 175; 1 Whart Cont., sections 402 to 414, inclusive. A wholesome rule of law is that parties should not be permitted to make contracts which are likely to set private interests in opposition to public duty or to the public welfare. This rule is recognized in our own case of Maguire v. Smock, 42 Ind. 1 (13 Am. R. 353), where it was held that an agreement to pay a consideration to a property owner for signing a petition to secure the improvement of a street was void, although there was no fraud, and although the person to whom the promise was made was really in favor of the improvement.

It is not necessary that actual fraud should be shown, for a contract which tends to the injury of the public service is void, although the parties entered into it honestly and proceeded under it in good faith. The courts do not inquire into the motives of the parties in the particular case to ascertain whether they were corrupt or not, but stop when it is ascertained that the contract is one which is opposed to public policy. Nor is it necessary to show that any evil was in fact done by or through the contract. The purpose of the rule is to prevent persons from assuming a position where selfish motives may impel them to sacrifice the public good to private benefit. An English author says: "But an agreement which has an apparent tendency that way, though an intention to use unlawful means be not admitted, or even be nominally disclaimed, will equally be held void." Pollock's Principles of Contracts, 286. In the case of Tool Co. v. Norris, *supra,* the court said: "All agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question, whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes

the door to temptation, by refusing them recognition in any of the courts of the country."

The case in hand is plainly distinguishable from those in which a promise is made to the public through its representatives. Here the motive of the contracting parties was to secure the location of a public office to advance their private interests, and not to benefit the public, and here, too, there was competition between two localities. The case, therefore, is one in which there should have been no influence brought to bear upon the decision of the contest except that of the public good.

The cases of Pierce v. Ruley, 5 Ind. 69; Commissioners v. Perry, 5 Ohio 56; State Treasurer v. Cross, 9 Vt. 289, hold that a contract with the officers of the state for the benefit of the state is valid, but they clearly distinguish between the cases where a promise is made to an individual for his private benefit and those in which the promise is made to a public officer for the benefit of the public. This distinction is made in the case of State v. Johnson, 52 Ind. 197, and in the course of the opinion the following extract from the decision in Clippinger v. Hepbaugh, 5 Watts & S. 315, is approvingly quoted: "It matters not that nothing improper was done or was expected to be done by the plaintiff. It is enough that such is the tendency of the contract, that it is contrary to sound morality and public policy, leading necessarily, in the hands of designing and corrupt men, to improper tampering with members, and the use of an extraneous, secret influence over an important branch of the government." The difference between the two classes of cases is clearly stated in Odineal v. Barry, 24 Miss. 9, where it was said: "The members of the board of police, as individuals, will not receive any portion of the money for which the note was given. At the time of the contract it was not intended or expected that they should receive it. It was not a proposition by the defendants to pay them so much as individuals, in consideration that they would not change the site of the court-house. If it had been, it would have been clearly illegal, and could not have been enforced."

It is true that a contract to pay for professional services in fairly placing the facts of a case before the officers of government is valid. Trist v. Child, 21 Wall. 441; Smith Leading Cases (7 Am. ed.) 692; Bryan v. Reynolds, 5 Wis. 200. But the contract in this case is not for professional services but for personal influence, and this constitutes an essential element, for personal influence is not a commodity for which money can be demanded. The case of Oscanyan v. Arms Co., 103 U. S. 261, cited by appellants, is directly against them upon this point. In the course of the opinion in that case it was said: "But, independently of the official relation of the plaintiff to his government, the personal influence which he stipulated to exert upon another officer of that government was not the subject of bargain and sale. Personal influence to be exercised over

an officer of government in the procurement of contracts, * * * is not a vendible article in our system of laws and morals, and the courts of the United States will not lend their aid to the vendor to collect the price of the article. Numerous adjudications to this effect are found in the state and federal courts. This is true when the vendor holds no official relations with the government, though the turpitude of the transaction becomes more glaring when he is also its officer." In Trist v. Child, *supra,* the court, in speaking of professional services, said: "But such services are separated by a broad line of demarcation from personal solicitation."

While contracts for the payment of fixed fees for professional services are valid, yet, when the fees are made contingent upon success in obtaining the desired legislation, the contract sought, or the office asked of the government, the contract becomes so tainted with illegality as to render it void. "High contingent compensation," said Justice Grier, "must necessarily lead to the use of improper means and the exercise of undue influence," and the decisions give approval to his discussion of the question of the legality of such contracts, and concur in the conclusion that all such contracts are against sound public policy. Marshall v. Baltimore, etc., R. R. Co., 16 How. 314; Meguire v. Corwine, 101 U. S. 108; Oscanyan v. Arms Co., *supra,* see opinion, page 274; Clippinger v. Hepbaugh, *supra;* Wood v. McCann, 6 Dana (Ky.) 366; Mills v. Mills, 40 N. Y. 543; Ormerod v. Dearman, 100 Pa. St. 561; s. c. 45 Am. R. 391.

The contract before us has two infirmities, one of an agreement for the use of personal influence, and another of an agreement for compensation dependent upon the contingency of success. That we are correct in saying that the agreement is dependent upon a contingency is shown by the fact that the consideration became payable only in the event that the post-office was located and maintained in appellant's building.

Doubtless, a contract to assist a property owner in fitting up or purchasing a building to be given to the government for public use would be valid, but in the present instance this was not the character of the consideration of the notes in suit, although such an element may have formed part of the consideration. The consideration of the notes is indivisible, and the illegal cannot be separated from the legal, and, under the familiar rule, that where the consideration is in part illegal, and there can be no separation, the whole contract is void. The contract before us must be held invalid because of the illegality of the consideration. Judgment affirmed.[1]

[1] See Robertson v. Robinson, 65 Ala. 610.

See Barnard v. Backhaus, 52 Wis. 593, as to the validity of an appointment to make gambling contracts.

In Roby v. West, 4 N. H. 285, it was held that a contract of employment to sell lottery tickets was void. A statute in force at the time made lotteries illegal.

HATFIELD v. OLDEN.

1838. Supreme Court at Philadelphia. 7 Watts, 152.

Error to the common pleas of Berks county.

This was an action of assumpsit by Daniel Olden against Adolph Hatfield, to recover from the defendant the sum of one thousand dollars, as a compensation to the plaintiff for procuring a pardon for the defendant, who had been convicted of murder in the second degree, and sentenced.

The court below was of opinion that the services [illegible] recovered by the plaintiff, if he [illegible] recover.

Hepburn, J.—D. v. Olden was plaintiff below, and brought case in assumpsit against Hatfield. The declaration consisted of three counts. The first set out that Hatfield had been indicted in the courts of over and terminer of Berks county, and tried, and a verdict of guilty, and sentenced to imprisonment for twelve years. That writ of writ of error had issued, to [illegible] the [illegible]. And that in pursuance of the said sentence the said Hatfield was in confinement in the Eastern penitentiary in the county of Philadelphia, and on the ..... day of ..... at said penitentiary, in consideration that the plaintiff, at the special instance and request of said defendant, had then and there agreed with and undertaken, and faithfully promised the said defendant to use all fair and honorable exertions to obtain from the governor of the commonwealth of Pennsylvania a pardon for the said defendant, being then and there imprisoned in pursuance of said sentence, etc. &c. he said defendant then and there agreed with, and faithfully promised to the said plaintiff to pay the said plaintiff the sum of one thousand dollars as a remuneration for his services and loss of time in using his exertions to obtain from the said governor of Pennsylvania a pardon, etc. And the plaintiff says that afterwards, to wit, at &c., the plaintiff did use all fair and honorable exertions to obtain etc., and that by reason thereof the defendant became indebted to pay the said sum of one thousand dollars, so by him promised, yet although often requested, etc.

The second count states that the defendant was indebted to plaintiff in other one thousand dollars for services performed in obtaining from the governor of Pennsylvania a pardon for one, and being so indebted promised, etc.

The third count charged that defendant was indebted to plaintiff in one thousand dollars, for money paid, laid out, and expended, etc., at defendant's request, in obtaining the same pardon.

Afterwards another count by leave of the court was filed, setting out as before the appointment and, assertion and judgment as in the first count, and [illegible] under the statute. And that the said

HATZFIELD v. GULDEN.

1838. Supreme Court of Pennsylvania. 7 Watts 152.

Error to the common pleas of Berks county.

This was an action of *assumpsit* by Daniel Gulden against Adolph Hatzfield, to recover from the defendant the sum of one thousand dollars as a compensation to the plaintiff for procuring a pardon for the defendant, who had been convicted of murder in the second degree, and sentenced.

The court below was of opinion that the law did not forbid a recovery by the plaintiff, if the jury believed he was otherwise entitled to recover.

Huston, J.—D. G. Gulden was plaintiff below, and brought case in assumpsit against Hatzfield. The declaration consisted of three counts. The first set out that Hatzfield had been indicted in the court of oyer and terminer of Berks county, and tried, and a verdict of guilty, and sentenced to confinement for twelve years. This was all set out at large and sentence in full, and the dates. And that in pursuance of the said sentence, the said Hatzfield was in confinement in the Eastern penitentiary in the county of Philadelphia, and on the ..... day of ..... at said penitentiary, in consideration that the plaintiff, at the special instance and request of said defendant, had then and there agreed with and undertaken, and faithfully promised the said defendant, to use all fair and honorable exertions to obtain from the governor of the commonwealth of Pennsylvania a pardon for the said defendant, being then and there imprisoned in pursuance of such sentence, etc. He, the said defendant, then and there agreed with, and faithfully promised to the said plaintiff to pay the said plaintiff the sum of one thousand dollars as a remuneration for his services and loss of time, in using his exertions to obtain from the said governor of Pennsylvania a pardon, etc.; and the plaintiff avers that afterwards, to wit, at, etc., the plaintiff did use all fair and honorable exertions to obtain, etc., and that by reason thereof the defendant became indebted to pay the said sum of one thousand dollars so by him promised, yet although often requested, etc.

The second count states that the defendant was indebted to plaintiff in other one thousand dollars for services performed in obtaining from the governor of Pennsylvania a pardon for, etc., and being so indebted, promised, etc.

The third count charged that defendant was indebted to plaintiff in one thousand dollars, for money paid, laid out, and expended, etc., not mentioning the crime or pardon.

Afterwards another count by leave of the court was filed, setting out at large the indictment, trial, conviction and judgment as in the first count, and imprisonment under the sentence; and that the said

Adolph required the said Daniel to labor, and do his endeavor to obtain his, the said Adolph's pardon from, etc.; and that afterwards did, by all the means he could, and by riding and journeying in the county of Berks, and to and from Harrisburg, etc., use all his endeavors to obtain, etc.; by reason of his exertions, riding, journeying and many days' labor, reasonably deserved to have other one thousand dollars, etc. Plea, *non assumpsit,* and issue. The proof in the cause was various, and not a little of it. W. Lewars, J. S. Holloway and Shoemaker proved that Hatzfield said he would satisfy Gulden; one of them that he made his promise while still in the penitentiary, and two of them that he said so after he was pardoned. J. Baily proved that he and a Mr. Sontag were appointed a committee of Hatzfield's property. That Gulden applied to them, offered to go through the county to get signers. That they agreed to pay him one hundred dollars in hand, and another one hundred dollars if he got him liberated, in September, 1834; paid the one hundred dollars; also gave him fifteen dollars in August, 1834; and also fifteen dollars in March, 1835; he was to obtain above twelve hundred signers to the petitions; but did not get so many. Hatzfield was liberated in April, 1835. P. Geiger, a member of the legislature from Berks at that time, proved Gulden's exertions; witness went with him to the governor; that he wished witness to get signers; said they would pay so much a head; witness got signers, but said he did not want pay. Another witness proved that Gulden gave him fifteen dollars to pay Snell, who would not give up his petitions and signers till paid. Peter Bright proved that he got in Reading between four and five hundred signers, at the request of Gulden and Snell; and he was to have three cents a head. The above is the substance, with the addition that many refused to sign, etc.; some proof of expenses paid by Gulden for horse hire to the amount of from ten to fifteen dollars.

The court told the jury: "There can be no recovery on an illegal contract, neither can there be a recovery on contracts which are prohibited by law; nor on contracts against which penalties are enjoined; nor a party cannot successfully come into court and say, 'Give me a sum of money which I claim, against or in violation of law.' This would not be tolerated nor countenanced; but I am not aware that it is unlawful to obtain a pardon by lawful means." And again: "If the defendant did employ the plaintiff to travel and spend time in procuring signatures to petitions, and to go and carry these petitions to the governor, and promised to pay him for his time, labor and trouble in performing this service, I think he can recover a reasonable and just compensation therefor."

The first three errors were in entering judgment for the plaintiff: because on these pleadings judgment should have been entered for the defendant; that the court ought to have told the jury that on

these pleadings and proof this action could not be sustained; and the third is the same in substance.

From the point to which the attention of the counsel was called by the court, nothing was said about these first three assignments of error. The case was put on the last count, and that a verdict on it was good; be it so; but perhaps it will be found that in all actions founded on illegal or immoral considerations, or on what is contrary to decency, or public good or policy, the form of the action or declaration on the evidence of the claim is immaterial, if the individual injustice or general good forbids such contract, or the law prohibits it; perhaps there is no case in which it can be made good and available by the mode of evidencing the agreement, or the form of action used to carry it into effect. To say nothing of gaming prohibited by law, marriage, brokage bonds, obligations entered into in restraint of trade.

In 4 T. R. 466, we find a suit on a bill of exchange; at the trial it came out that the bill or bills were given to pay the balance due for brandy sold in Guernsey to be smuggled into England. Lord Kenyon said there was no harm in selling brandy; it was the intent and design of the transaction which made it such that a court ought not to carry it into effect; and so far was this carried in 5 T. R. 592, it was held that a Frenchman who sold brandy to be smuggled into England could not recover the price in England, though he had violated no law of his own country where he made the sale.

The case of Mitchell v. Smith, in 1 Binn. 110 (2 Am. Dec. 417), was a debt on a single bill drawn in the usual form. The consideration was one forbidden by the policy and laws of the state; no regard was paid to the pleadings, and no one suggested that they could have any effect on the decision; and the cause went on the broad ground that if the transaction out of which the claim arose was forbidden by positive or general law, the claim could not be recovered. The power to pardon is a constitutional power; to alleviate or remit punishment where perhaps there is doubt of guilt; or where the offense was committed under circumstances extenuating the crime, etc. The general and spontaneous expression of opinion has had, and ought to have, weight with the governor. But if undue means are used to obtain petitioners, it may be a great imposition on the governor.

The power to pardon may be considered as a part of the penal code of the state; it operates after trial to be sure, generally, but may be exercised before. It is as important that it should be free from bias, or prejudice, or crime, as that the trial should be so. No man would say that if it were possible to procure a pardon by direct payment to a governor, it would be lawful to give one. To bribe others to deceive and impose on him, only differs in degree.

In this case the first offer came from Gulden to the trustees of the prisoner: they paid in hand, before he stirred, one hundred dol-

lars; and afterwards, at least twice, fifteen dollars; through the whole business, he appears to be acting, not from pity, not from a sense that the punishment was too severe, not from friendship to the prisoner, but for his own gain and emolument. At his last interview in the cells, Holloway is called back to witness a promise of payment.

It is not necessary to say whether, after the whole transaction is closed, a person who incidentally paid some postage, or who, under special circumstances, carried a petition, the signatures to which were spontaneously made, may not receive his actual expense and daily pay. I would say it must be a very special case, however, to justify this. But this is not such a case; and we do not wish to see advertisements, that pardons will be obtained at the lowest price, nor anything which approaches to it; and generally, all contracts to change the course of trials, or the effects of trials, whether to obtain a liberation of a prisoner by money to the jailer, or to obtain a pardon by the use of money, directly or indirectly, must be void.

Judgment reversed.[1]

[1] Compare Chadwick v. Knox, 31 N. H. 226.

In Thompson v. Wharton, 7 Bush (Ky.) 563, it was held that an agreement to secure the release of one convicted by a court without jurisdiction is not void, not being against public policy.

CHAPTER IV

CREATION OF AGENCY

Section 1.—Authority to Execute Sealed Instruments

BURNS and WIFE *v.* LYNDE.

1865. SUPREME JUDICIAL COURT OF MASSACHUSETTS. 6 Allen 305.

BILL in equity praying that the defendant might be ordered to reconvey to Mary Burns, the female plaintiff, her interest in certain real estate. The defendant filed a demurrer, which was overruled; and the case was heard by Merrick, J., who, after decreeing that the said Mary was entitled to the relief prayed for in the bill, and that a decree to that effect ought to be made, reserved it for the final determination of the whole court. The case is stated in the opinion.

CHAPMAN, J. The demurrer having been overruled, and the cause heard upon the evidence, all the matters in controversy are now before us, as well upon the demurrer as upon the merits of the case. The causes of demurrer assigned are as follows:

1. "That said bill had not been properly signed by the plaintiffs, but is signed by said Mary Burns alone." It is in fact signed "Jefferson Burns, by Mary Burns." And "Mary Burns" was entered to which prohibits him from making for his attorney to sign the bill, and we are not aware that any such rule or principle exist.

2. "That said Mary Burns has not set forth, nor has she any power of attorney to sign said bill in behalf of Jefferson Burns." It is true there is no allegation of a power of attorney, nor is such allegation necessary. The husband is named as plaintiff in the bill, the has signed it on his behalf, and he appears to prosecute it; and this is sufficient.

3. "That said Jefferson Burns has not signed or sworn to said bill." The matter of the divorce is already disposed of; and it is hardly necessary to say that a bill need not be sworn to.

4. The other causes assigned relate to the merits of the case, the substance of them being that Mary Burns is not entitled to the relief which she seeks.

5. The twelfth [illegible] was signed at the [illegible] words

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1. "That said bill had not been properly signed by the plaintiffs, but is signed by said Mary Burns alone." It is in fact signed "Jefferson Burns, by Mary Burns," and "Mary Burns." No rule is referred to which prohibits him from making her his attorney to sign the bill, and we are not aware that any such rule or principle exists.

2. "That said Mary Burns has not set forth, nor has she any power of attorney to sign said bill in behalf of Jefferson Burns." It is true there is no allegation of a power of attorney, nor is such allegation necessary. The husband is named as plaintiff in the bill, she has signed it on his behalf, and he appears to prosecute it; and this is sufficient.

3. "That said Jefferson Burns has not signed or sworn to said bill." The matter of the signature is already disposed of; and it is hardly necessary to say that a bill need not be sworn to.

4. The other causes assigned relate to the merits of the case, the substance of them being that Mary Burns is not entitled to the relief which she seeks.

5. But another formal cause was alleged at the hearing which

should be considered here. It is contended that, as the remedy sought is only for the wife, the husband is improperly joined with her as plaintiff.

Though a married woman may bring a bill for the protection of her separate interests without joining her husband, and may, in a proper case, make him a defendant, yet it is proper for her to join him as plaintiff with her in a case in which he has no interest. This is because he is the natural protector of her interests, and is in conformity with the rule of law. Story Eq. Pl., § 63.

We are brought, then, to the question whether, upon the allegations of the bill and the case as reported, Mary Burns has established her claim to the relief sought for.

The object of the bill is to set aside a deed, as to her, which purports to be an absolute warranty deed of the land described in it, executed and acknowledged by her husband; and also executed by herself, for the purpose of releasing her rights of dower and homestead in the land. It appears by the report that when her seal and signature were affixed to the paper it was a printed form of a deed, in which none of the blanks had been filled up. She gave it to the defendant, who filled the blanks in her absence, by writing the names of the parties, the description of the land, the agreement of release on her part, and also the date and the other words necessary to complete it. After being thus filled, it was executed and acknowledged by her husband. The defendant offered to prove that when she signed it she authorized him to fill it up as he did; and that after it was filled up, and the husband had executed it, the defendant informed her of the facts, and she thereupon verbally assented to what had been done, and agreed that it should be taken to be her deed duly executed. This evidence was rejected; and the question presented is, whether these facts, if proved, would have made the instrument valid as her deed. The ancient doctrine of the common law, as stated in the authorities cited by the plaintiff's counsel, is not denied. It is stated in Shep. Touchstone, 54, as follows: "Every deed well made must be written; *i. e.*, the agreement must be all written before the sealing and delivery of it; for if a man seal and deliver an empty piece of paper or parchment, albeit he do there withal give commandment that an obligation or other matter shall be written in it, and this be done accordingly, yet this is no good deed."

This doctrine still prevails in England. The case of Texira v. Evans, which was tried at *nisi prius,* is cited in Master v. Miller, 1 Anstr. 228, in which Lord Mansfield held a contrary doctrine. In that case the defendant, wishing to raise money, had signed and sealed a bond, and placed it in the hands of an agent, with blanks for the sum and the name of the obligee. The agent borrowed the money of the plaintiff, and filled up the blanks with the sum borrowed and the name of the plaintiff. The deed was held good. But in Hibblewhite v. M'Morine, 6 M. & W. 200, the question arose in respect to a convey-

ance of railway shares which was required by statute to be by deed. The name of the purchaser had been left blank, and was written by him after the conveyance to him. The point was thoroughly argued, and most of the English cases which had any bearing on it were cited. Upon full consideration the conveyance was held to be void. The case of Tepira v. Evans was overruled. Parke, B., remarked that it had been justly questioned by Mr. Preston in his edition of Sheppard's Touchstone, "as it assumes there could be an attorney without deed." And he says of the defense in that case that it is an attempt to make a deed transferable and negotiable like a bill of exchange or an exchequer bill, which the law does not permit.

In Davidson v. Cooper, 11 M. & W. 793, the case of Texira v. Evans is again referred to and is declared to be overruled.

But the defendant's counsel contend that the English doctrine does not prevail in Massachusetts, New York and Pennsylvania. It is true that in the latter state the authority of Texira v. Evans is adopted, and the case is said to have overruled the authority of Sheppard's Touchstone, Perkins and Coke upon Littleton. Wiley v. Moor, 17 S. & R. 438. It has also been adopted in New York in Wooley v. Constant, 4 Johns. 54. In that case, a bill of sale of a ship had been executed, leaving blanks for the recital of the register; and these were filled up after the delivery, by consent of parties. It was held to be valid, on the authority of Texira v. Evans. But the action was trover for the ship, and the court remarked that the bill of sale was perfectly competent, with the blank in it to pass the property. The same case was again cited as authority in *Ex parte* Kerwin, 8 Cow. 118, where the bond would not have been valid without filling the blanks.

None of the cases decided by this court adopt the authority of Texira v. Evans, though some of them give some countenance to its doctrines. In Smith v. Crooker, 5 Mass. 538, a treasurer had made a bond in which the name of the surety had been left blank; and after delivery it was filled up. The bond was held good, on the authority of several ancient cases, the fact being specially noticed that the alteration was immaterial. In Hunt v. Adams, 6 Mass. 519, the instrument in question was a promissory note, not under seal, and therefore the question did not arise. The immaterial word "year" had at first been omitted, and was afterwards inserted. But Parsons, C. J., in giving the opinion, cited the authorities relating to deeds, which he had before cited in Smith v. Crooker, and also said that in custom-house bonds it was the practice to leave a blank for the amount of the duties when ascertained, to be filled after delivery, the obligors being considered as consenting that the blanks shall be thus filled up. The case of Warring v. Williams, 8 Pick. 322, decides that where an instrument was signed by several parties, and afterwards altered by the addition of a seal and the interlineation of the words "jointly and severally," a party to the instrument who was present and consenting

to the alteration would be bound by it, though the others were not bound. But in the very next case of Warring v. Williams, *Ib.* 326, which was an action brought against another party to the same instrument, it was held that a signature in blank does not authorize anything to be written over it beyond a simple contract, and that authority to affix a seal requires a power of attorney under seal. Parker v. Hill, 8 Met. 447, merely decides that a ratification of the delivery of a deed may be proved by the acts and declarations of the grantor, and that his declarations made to a person who is not a party to the instrument are admissible in evidence. The editors of the American edition of the Exchequer Reports, in a note to Hibblewhite v. M'Morine, cite some of the above cases, and also the case of Adams v. Frye, 3 Met. 103, as adopting the doctrine that blanks left in a deed may be filled by consent of parties, after delivery. But the case of Adams v. Frye relates altogether to a different point. The alteration there considered was not the filling of a blank by consent, but procuring a person to subscribe his name as a witness after delivery, and without consent. The court held that it would not avoid the deed unless fraudulently done.

Gardner v. Gardner, 5 Cush. 483, cited for the plaintiffs, decides that a deed, signed for the grantor in his presence, and at his request, is good without a power of attorney. Its value as bearing upon the question before us is, that it states accurately the distinction between acts done in the presence and by the direction of the principal, and acts done in his absence. The former are regarded as by the principal himself and the instrument need not purport to be executed by attorney, while the latter must be done under a power, and must purport to be so done. According to this distinction, it is held in England that where a deed is delivered containing blanks to be filled up, they may afterwards be filled in the presence and by the direction of the grantor, and the deed is valid. This is on the ground that such acts are equivalent to a redelivery of the deed in a perfect state by the grantor. Hudson v. Revett, 5 Bing. 368. The filling of the blanks in his presence and by his consent is equivalent to filling them by his own hand; the deed is then under his own control, and may be delivered as a perfect deed.

From this review of the cases decided in this court, it is apparent that they contain nothing decisive of the point before us. Smith v. Crooker is the most favorable to the defendant's views of any of them; but it does not go further than Eagleton v. Gutteridge, 11 M. & W. 466. In that case a power of attorney had been executed abroad, and sent to the attorney with a blank for his Christian name. He filled the blank, and this act was held not to invalidate the instrument. But this decision was made by the same court that overruled the case of Texira v. Evans, and at the term prior to the decision of Davidson v. Cooper, and must have been regarded as consistent with that case, and with Hibblewhite v. M'Morine. If the filling of the

blank is not material to the validity of the instrument, it may, according to that case and the case of Smith v. Crooker, be filled after delivery.

In the present case, there was no delivery of the instrument when the blanks were filled. All that the defendant offered to prove was that he communicated the facts to Mrs. Harris, and she assented to what he had done, and consented that he might hold it as his deed. If the deed had been present and exhibited to her at the time, and she had been made fully acquainted with its contents by reading or otherwise, and had it under her control, and had then consented that the defendant should take it as his deed, it would have been legally delivered in a perfect state. But with all the presence of the deed nothing equivalent to this could take place.

When the power was delivered, it had no validity or meaning. The filling of the blanks formed the most important part of the instrument itself, as much as or the signing or sealing. If such an act can be done under a parol agreement in the absence of the grantee, or effected, and be so overthrown, the doctrine that authority to make a deed must be given by a deed. We do not think such a change of the ancient common law has been made in this commonwealth, or that the policy of our legislation tends to it, or that courts would introduce such a change. Our statute, which provides for the conveyance of real estate by deed, acknowledged and recorded, and for the acknowledgment and recording of powers of attorney for making deeds, are evidently based on the ancient doctrines of the common law, respecting the execution of deeds, and a salutary and important purpose which these doctrines still serve is to guard against mistakes, which are likely to arise out of verbal arrangements, from misunderstanding and defect of memory, even when honestly entertained. The present case shows how dangerous the contrary doctrine would be. Mary Burns states in her bill that the verbal agreement made between her and the defendant was, that her interest in her husband's land should be held to indemnify the persons who should become bail for the appellant on appeal, and for no other purpose, and that the deed was filled up as an absolute conveyance contrary to this agreement. She makes oath to the truth of these allegations, and it is to be presumed that she believed them to be true. The defendant offered to prove the contrary, and probably he would have been a witness to prove his statement. It is to be presumed that he is understood. If the method of executing deeds is considered, it will follow that, although the defendant has a regularly executed deed, yet it requires to be aided by parol evidence whether he ought to have the property, and how much he ought to have. It is settled, whether the deed should have been absolute or conditional, when the terms of the condition should have been performed, when the terms of the condition should have been performed. To apply this to the case before us, such doctrine would introduce them in error and needless uncertainty.

blank is not material to the validity of the instrument, it may, according to that case and the case of Smith v. Crooker, be filled after delivery.

In the present case, there was no redelivery of the instrument after the blanks were filled. All that the defendant offered to prove was, that he communicated the facts to Mrs. Burns, and she assented to what he had done, and consented that he might hold it as her deed. If the deed had been present and exhibited to her at the time, and she had been made fully acquainted with its contents by reading or otherwise, and had it under her control, and had then consented that the defendant should take it as her deed, it would have been legally delivered in a perfect state. But without the presence of the deed, nothing equivalent to this could take place.

When the paper was delivered, it had no validity or meaning. The filling of the blanks created the substantial parts of the instrument itself; as much so as the signing or sealing. If such an act can be done under a parol agreement, in the absence of the grantor, its effect must be to overthrow the doctrine that an authority to make a deed must be given by a deed. We do not think such a change of the ancient common law has been made in this commonwealth, or that the policy of our legislation favors it, or that sound policy would dictate such a change. Our statutes, which provide for the conveyance of real estate by deed, acknowledged and recorded, and for the acknowledgment and recording of powers of attorney for making deeds are evidently based on the ancient doctrines of the common law respecting the execution of deeds; and a valuable and important purpose which these doctrines still serve is, to guard against mistakes which are likely to arise out of verbal arrangements, from misunderstanding and defect of memory, even where there is no fraud. The present case shows how dangerous the contrary doctrine would be. Mary Burns states in her bill that the verbal agreement made between her and the defendant was, that her interest in her husband's land should be held to indemnify the persons who should become bail for his appearance at court, and for no other purpose, and that the deed was filled up as an absolute conveyance, contrary to this agreement. She makes oath to the truth of these allegations, and it is to be presumed that she believes them to be true. The defendant offered to prove the contrary; and probably he would have been a witness to prove his statement. It is to be presumed that he so understood the agreement. If this method of executing deeds is sanctioned, it will follow that, though the defendant has a regularly executed deed, yet it remains to be settled by parol evidence whether he ought to have been the grantee, what land should have been described, whether the deed should have been absolute or conditional, and if conditional, what the terms of the condition should have been. To leave titles to real estate subject to such disputes would subject them to great and needless insecurity.

And in respect to agreements which do not relate to real estate, it is highly useful that a class of instruments should exist, to which persons may resort with a feeling of confidence that they shall not be binding till they are formally executed, and that when thus executed they shall not be liable to be varied or controlled by parol evidence. The importance of these formalities is greatly increased by the fact that parties are now made competent witnesses. The convenience which men might occasionally find in leaving blanks in sealed instruments to be filled after delivery, would be but a slight compensation for the evils which would follow the abrogation of the ancient rule of the common law.

The deed not having been executed by Mary Burns must be regarded as void, so far as her estate is concerned. It is valid as to her husband, so far as he could by his sole deed convey land in which a right of homestead existed; that is, it conveyed his reversionary interest after the termination of the homestead estate. Smith v. Provin, 4 Allen 516. As to the homestead estate and the wife's right of dower, the deed constitutes a cloud upon the title, and a bill in equity lies to remove such cloud, in cases where there is not a plain, adequate and complete remedy at law. 2 Story on Eq. 700; Hamilton v. Cummings, 1 Johns. Ch. 517; Scott v. Onderdonk, 4 Kernan 1.

It is obvious that Mary Burns could not maintain an action at law in respect to her right of dower; and as she is in occupation of the premises, living in the dwelling house, she could not, without abandoning the possession, maintain a writ of entry in respect to her right of homestead. Stearns on Real Actions, 215, 216. Her only remedy is in equity.

The defendant contends that she has no equity which the court should enforce, until she pays his claim against the husband, being an account for services and expenses in defending the husband in several criminal prosecutions, and for supplies furnished to the family. But the contract of a wife to become responsible with her husband as surety for the payment of his debts has no legal validity, and should not be regarded as valid in equity. We cannot extend her liabilities beyond the point where our recent legislation has carried them.

A decree should be entered that the defendant execute to Mary Burns a release of all the rights of dower and homestead which the deed purports to convey to him, to be framed according to the direction of the court; and that the plaintiffs recover their costs of suit.[1]

[1] *Accord:* Preston v. Hull, 23 Gratt. (Va.) 600; Gilbert v. Anthony, 1 Yerg. (Tenn.) 69.

Compare with these cases Upton v. Archer, 41 Cal. 85.

Contra: Cribben v. Deal, 21 Ore. 211; Allen v. Withrow, 110 U. S. 119. See also Bridgeport Bank v. New York, etc., R. Co., 30 Conn. 231, 274.

See Daniel on Negotiable Instruments, §§ 142–147, regarding authority to fill blanks in negotiable instruments.

WORRALL v. MUNN (5 N. Y. 229).

1852. COURT OF APPEALS OF NEW YORK. (5 N. Y. 229.)

Appeal from the general term of the supreme court, where a decree of the vice-chancellor of the second circuit for the specific performance of a contract for the sale of lands was reversed, and the bill dismissed, without prejudice to the complainant's remedy at law for damages.

This was a bill in equity exhibited in the late court of chancery by Noah Worrall against the defendants, Munn and Frail, to compel the specific performance of a contract for the sale of certain lands. Overruled.

The defendant, Frail, by contract under seal, dated the 29th of October, 1842, agreed to convey to the plaintiff, in fee, on or before the first day of April then next, the whole of lot number [illegible] in the city of [illegible], containing about [illegible] acres, for the sum of $4,500, the sum of $500 to be paid on the delivery of the deed, and the balance to remain on bond and mortgage, at the rate of seven per cent, payable on or before the expiration of three years from the date of said deed. A memorandum of the agreement was indorsed on it, "Henry Worrall, for Noah Worrall," the last being placed at the end of Henry Worrall's name.

Frail subsequently refused to perform the agreement; and on the 1st of December, 1843, conveyed to [illegible] the defendant, Munn, for $5,500. The latter purchased with full notice of the plaintiff's rights, and gave Frail an indemnity against Worrall's claim.

In the year of December, 1843, the plaintiff tendered to Frail a deed and mortgage, and the first payment specified in the agreement, and demanded a deed; and offered to have the deed and bond and mortgage executed in accordance with the agreement, and if denied by Frail, then from the whole consideration; and on the 1st of April, 1844, plaintiff made a like tender; and offer to [illegible] both of which were refused.

The defendants, in their answer, set up certain discoveries to the [illegible], which, with other facts proved on the hearing, are fully stated in the opinion of the court. The cause was brought to a hearing before the vice-chancellor of the second circuit, on the pleadings and proofs, who decreed a specific performance. From this decree the defendants appealed to the supreme court, where the decree was reversed, without prejudice to any remedy at law which the complainant might have against Frail upon the agreement for damages, from which decision both parties appealed.

[illegible]

The only remaining questions to be considered are whether the plaintiff has shown any ground for relief in connection with the question of consideration [illegible]

[illegible] Reversed.

[1] [illegible]

WORRALL v. MUNN and Another.

1851. Court of Appeals of New York. 5 N. Y. 229.

Appeal from the general term of the supreme court, where a decree of the vice-chancellor of the second circuit for the specific performance of a contract for the sale of lands, had been reversed, and the bill dismissed, without prejudice to the complainant's remedy at law for damages.

This was a bill in equity exhibited in the late court of chancery by Noah Worrall against the defendants, Munn and Prall, to compel the specific performance of a contract for the sale of certain lands in Haverstraw, Rockland county.

The defendant, Prall, by contract under seal, dated the 27th of November, 1843, agreed to convey to the plaintiff, by deed, on or before the first day of April then next, the lands in question, for the price of $4,500, the sum of $500 to be paid on the delivery of the deed, and the balance to remain on bond and mortgage, at the rate of six per cent., payable on or before the expiration of three years from the date of said deed. A counterpart of the agreement was executed by "Henry Worrall, for Noah Worrall," the seal being affixed at the end of Henry Worrall's name.

Prall subsequently refused to perform the agreement and, on the 11th of December, 1843, contracted to sell the lands to the defendant Munn for $5,500. The latter purchased with full notice of the plaintiff's rights, and gave Prall an indemnity against Worrall's claim.

On the 22d of December, 1843, the plaintiff tendered to Prall a bond and mortgage, and the first payment specified in the agreement, and demanded a deed and offered to have the deed and bond and mortgage bear even date with the agreement, and, if desired by Prall, to pay him the whole consideration; and, on the 1st of April, 1844, the plaintiff made a like tender and offer to Munn; both of which were refused.

The defendants, by their answers, set up certain objections to the contract, which, with other facts proved on the hearing, are fully stated in the opinion of the court. The case was brought to a hearing before the vice-chancellor of the second circuit, on the pleadings and proofs, who decreed a specific performance. From this decree, Munn alone appealed to the supreme court, where the decree was reversed without prejudice to any remedy at law, which the complainant might have against Prall upon his agreement for damages. The plaintiff thereupon took this appeal.

Paige, J.—[1] * * *

The only remaining questions to be considered are, whether the

[1] A portion of the opinion not dealing with the question of appointment is omitted.

authority of Henry Worrall to execute the counterpart should have been under seal; whether he executed the agreement in the name of his principal; and if the counterpart was not binding on Noah Worrall, whether the original was binding on Prall.

It is a maxim of the common law that an authority to execute a deed or instrument under seal must be conferred by an instrument of equal dignity and solemnity; that is, by one under seal. This rule is purely technical; a disposition has been manifested by most of the American courts, to relax its strictness, especially in its application to partnership and commercial transactions. I think, the doctrine, as it now prevails, may be stated as follows, viz., if a conveyance or any act is required to be by deed, the authority of the attorney or agent to execute it must be conferred by deed; but if the instrument or act would be effectual, without a seal, the addition of a seal will not render an authority under seal necessary, and if executed under a parol authority, or subsequently ratified or adopted by parol, the instrument or act will be valid and binding on the principal. It is said that the rule as thus relaxed is confined in its application to transactions between partners; but it seems to me that a distinction between partners and other persons, in the application of the rule, as relaxed and qualified by recent decisions, stands upon no solid foundation of reason or principle.

The whole authority of a partner to act for his co-partners and to bind them and their interest in the co-partnership property, is founded upon the common-law doctrine of agency; so far as he acts for his partners, he is an agent. (Story on Part., § 1.) Thus, it is a general rule of the common law that one partner cannot, from the mere relation of partnership, bind his co-partners by deed or instrument under seal, even in commercial dealings, unless specially authorized to do so by an instrument under seal. (Story on Part. § 117; 3 Kent Com. 47, 6th edition.) This rule springs from the common-law maxim before mentioned, applicable to the general relation of principal and agent.

There are numerous cases in the American courts in which the rule has been relaxed as regards partnership transactions, in order to adapt it to the necessities of trade. (Story on Part., § 117; 3 Kent's Com. 48.) Thus, the doctrine, as applicable to partners, is now firmly established that wherever an act done by a partner, within the scope of the partnership business would be valid if done by an unsealed instrument, then, although done by an instrument under seal, it will be valid and bind his co-partners, if it is authorized by a prior parol authority, or adopted by a subsequent parol ratification. (Story on Part., §§ 121, 122; Anderson v. Tompkins, 1 Brock. Cir. C. 462, Marshall, C. J.; 3 Kent's Com. 48, 6 Ed.; Smith v. Kerr, 3 Comst. 150; Gram v. Seton, 1 Hall 262, Jones, C. J.; Skinner v. Dayton, 19 Johns. 513, 553; Everit v. Strong, 5 Hill 163; Tapley v. Butterfield, 1 Metc. 515; Cady v. Shepard, 11 Pick. 400,

403.) And the rule that one partner cannot bind his co-partners by deed, without an authority under seal, has been held, in several cases, not to apply to a case where one partner conveys by deed, property of the firm, which he might have conveyed by an unsealed instrument or by parol. The mere addition of the seal does not vitiate the conveyance. Topley v. Butterfield, 1 Metc. 515; Anderson v. Tompkins, 1 Brock. Cir. C. 462; Everit v. Strong, 5 Hill 165; Milton v. Mosher, 7 Metc. 244.) In Gram v. Seton (*supra*), Chief Justice Jones, of the superior court of the city of New York, held that the authority of one partner to bind his co-partners by deed, may even be implied from the acts and acquiescence of the co-partners. No good reason can be assigned for a distinction between partners and other persons, in relation to the technical rule of the common law, that in all cases an authority to execute a deed must be by deed. The rights and liabilities of partners in their acts for each other are governed by the same rules as are the relations of principal and agent; each partner being considered an agent for his co-partners; and the same questions of express and implied, general and special authority must arise between partners, as between principal and agent. Upon principle, therefore, whenever an instrument, either as between partners, or principal and agent, would be effectual for the purpose intended, without a seal, the addition of a seal should not create the necessity of an authority under seal, to authorize an agent to execute it.

In Lawrence v. Taylor (5 Hill 113), Cowen, J., speaking of a specialty executed by an attorney, without authority under seal, says: "Yet in such case it does not follow that it shall not operate at all; if the contract may be made without deed the seal shall not prevent its inuring as a simple contract, though the authority be by parol, or merely implied from the relations between the principal and agent." In Skinner v. Dayton (19 Johns. 554, 558, in the court of errors), Spencer, Ch. J., held that the contract executed in that case by Skinner, under seal, for the directors of the company, ought not to be considered a personal covenant of Skinner, in equity, and that the company were liable for a breach of the covenant, although the authority of Skinner was not conferred by deed; and such was the decision of the court of errors. Skinner was a director and the president of an association for manufacturing cotton, and entered into a contract for the making of some machinery for the company; the contract was ratified by the subsequent parol assent and acts of the stockholders. The court decided that such subsequent ratification was an adoption of the act of the agent and equivalent to a previous positive and direct authorization to do the act.

In Randall v. Van Vechten (19 Johns. 60), a contract under seal had been entered into by the defendants, as a committee of the corporation of the city of Albany, with the plaintiffs, without authority under seal from the corporation. But the corporation had subsequently recognized by parol the authority of the committee to make

the contract, and it was held that the contract was binding on the corporation and that an action of *assumpsit* would lie against the corporation for its breach.

In the Bank of Columbia v. Patterson (7 Cranch 299, 307), a committee of the corporation, without any authority conferred by deed, had made a contract in their own names as such committee under their private seals, and the Supreme Court of the United States held that as the whole benefit of the contract resulted to the corporation, and as the corporation had, by its acts, subsequently adopted the contract an action of *assumpsit* would lie on the contract against the corporation.

In White v. Cuyler (6 T. R. 176), where a wife, unauthorized by her husband, made an agreement under seal with a servant, providing for the services, it was held, that although the covenant of the wife could not bind the husband, the servant could nevertheless maintain *assumpsit* against the husband. In Damon v. Granby (2 Pick. 352), it was decided that although an agent who contracts for the use of a corporation, under his own seal, does not bind the corporation by the deed, yet if he had authority to make the contract, it shall be binding on the corporation, as evidence of such contract.

In Evans v. Wells (22 Wend. 340, 341), Senator Verplank said that these rules as to sealed instruments were not applicable to cases where a deed is not necessary, and that in such cases, an act of the agent, under seal, may be ratified by acts *in pais*.

In Hanford v. McNair (9 Wend. 54), an agent had executed a contract under seal, for the purchase of timber, not being authorized by deed: SUTHERLAND, J., said, that subsequent acts of the principal, recognizing and carrying the agreement into effect, might be sufficient to make the contract binding on the principal as a parol contract. In Blood v. Goodrich (12 Wend. 527) and in Hanford v. McNair (9 Id. 54), the supreme court, in laying down the common-law rule that an authority to execute a deed must be conferred by deed, did not advert to the distinction between cases where the conveyance or contract must be made under seal, and cases where they would be effectual without a deed. These authorities show that there is no distinction between partners and other persons, in the application of the modern rule, that wherever an instrument would be effectual, without a seal, it will be valid and binding on the principal, although executed under seal by an agent, without authority by deed, if authorized by a previous parol authority or subsequently ratified or adopted by parol.

In this case a seal was not necessary to the validity of the contract for the sale of the lands at Haverstraw. All that the statute of frauds requires is, that a contract for the sale of lands shall be in writing, and that such writing express the consideration, and be subscribed by the party by whom the sale is made, or by his agent lawfully authorized. The authority of the agent may be conferred by parol;

neither a written authority nor an authority under seal is required. [2 Rev. Stat. 135, §§ 8 and 9. 10 Pingr. 380; 5 Hill 107.] It results from the foregoing authorities that the counterpart of the agreement executed by Henry Worrall, under seal, was binding on the principal, although his authority to execute it was not conferred by deed. * * * The decree of the supreme court must, therefore, be reversed and the decree of the vice-chancellor affirmed.

Decree of the supreme court reversed, and that of the vice-chancellor affirmed.

CRUM v. BUSENBARK, et al.

1885. Supreme Court of Indiana. 72 Ind. 38.

Niblack, C. J. — The complaint in this cause represented that the defendant Emerson Busenbark, on the 26th day of April, 1875, recovered a judgment in the court below against one Squire Clark, for $650.50 and afterwards, on the 26th day of June, 1875, Edwin Clark and William J. King became endorsers bail for the payment of such judgment, and that at the same time some person unknown to and without the consent of the plaintiff, Frederick Crum, agreed for a consideration to release said judgment as endorsers with the said Edwin Clark and William J. King; that an execution has been issued on said judgment against the said Squire Clark, on the judgment debtor, and against the said Edwin Clark, William J. King and the plaintiff, as sureties bail, and placed in the hands of William

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The legal effect of such bail has been studied in England by writers of acknowledged ability. See Code of Iowa (1873), § 3481, Gantt, Surety and Guar. of Indemnity, §§ 206, 207, and note; 25 Am. & Eng. Ency. (2d ed.) 7.

The necessity to the valid execution of the written agreement, being first in point, it is proper that it should next be considered. That consent of minds does not require the use of a particular form of words to constitute a contract is familiar to be a truism. It exists whenever two or more persons agree in the same. The distinction is clearly drawn in the terms of the statute between giving and promising to convey land. By the former case, under the statute, the power of the grantor can not be withdrawn, while in the latter case the promisor, by refusing to perform his promise, and the party, both in England and the United States, that the specific performance may be compelled. The contract in this case was settled by the jury to have been made. It remains to be shown that the consent was that a power of attorney should be executed by the plaintiff to the defendant, and that the latter should not be compelled by an instrument of equal solemnity. It was thus given to the court to understand, and that by several witnesses. On the authority of the same case before mentioned, in 10 Pingr., Gantt, Surety and Guar. of Indemnity, § 206, and note, 25 Am. & Eng. Ency. (2d ed.) 7.

neither a written authority nor an authority under seal is required. (2 Rev. Stat. 135, §§ 8 and 9; 10 Paige 386; 5 Hill 107.) It results from the foregoing authorities that the counterpart of the agreement executed by Henry Worrall, under seal, was binding on his principal, although his authority to execute it was not conferred by deed. * * * The decree of the supreme court must, therefore, be reversed, and the decree of the vice-chancellor affirmed.

Decree of the supreme court reversed, and that of the vice-chancellor affirmed.[2]

CROY v. BUSENBARK et al.

1880. Supreme Court of Indiana. 72 Ind. 48.

Niblack, C. J.—The complaint in this case represented that the defendant Emmons Busenbark, on the 26th day of April, 1875, recovered a judgment in the court below against one Squire Clark, for $863.90; that afterward, on the 28th day of June, 1875, Edwin Clark and William J. Krug became replevin bail for the payment of such judgment, and that at the same time some person unknown to, and without the consent of, the plaintiff, Frederick Croy, signed his name to the entry of replevin bail on such judgment as co-obligor with the said Edwin Clark and William J. Krug; that an execution had been issued on said judgment against the said Squire Clark, as the judgment debtor, and against the said Edwin Clark, William J. Krug and the plaintiff, as replevin bail, and placed in the hands of William

[2] The legal effect of seals has been annulled or limited by statute in many states. See Code of Iowa (1897), § 3068; Burns' Revised Stat. of Indiana (1908), §§ 466, 4041 and 4042; 25 Am. & Eng. Ency. (2d ed.) 79.

"The authority to the agent to execute the written agreement having been by parol, it is insisted that it does not bind the principal. Our statute of frauds does not require the agent's authority to make a contract to convey land to be in writing; it exacts a written contract, not a written power to the agent. The distinction is clearly drawn in the terms of the statute between conveying and contracts to convey land. In the former case, under the tenth section, the power to the agent must be in writing; while in the latter, under the fourteenth section, the words 'in writing' are omitted, and the cases, both in England and this country, agree that the appointment may be by parol. The fact that the contract in this case was sealed by the agent does not vitiate it. There is no doubt about the general rule that a power to execute an instrument under seal must be conferred by an instrument of equal solemnity. If the writing given by the agent be under seal, and that be essential to its validity, the authority of the agent must be of equal dignity, or it cannot operate. Here a seal was not vital to the contract; there was no authority to the agent to attach a seal, therefore the seal is of no value, but the power to execute the contract without seal having been ample, so far it becomes the act of the principal, and inures as a simple contract." Van Syckel, J., in Long v. Hartwell, 34 N. J. L. 116, 121.

J. Krug, as sheriff of Montgomery county, who was threatening to levy such execution on the property of the plaintiff. Wherefore the plaintiff prayed that the said Krug, as such sheriff, might be enjoined from levying such execution upon his property, and for other relief.

At the request of the plaintiff the court made a special finding of the facts. The facts, as found by the court, may be stated as follows: That a judgment was rendered in the Montgomery circuit court, in favor of Emmons Busenbark and against Squire Clark, on the 26th day of April, 1875; that the defendant William J. Krug, as sheriff of Montgomery county, held, and had held since the 18th day of June, 1878, an execution on such judgment for the sum of $570.67, the balance due thereon; that said Krug had levied said execution upon the real estate of the plaintiff, and was about to sell said real estate to satisfy said execution, and would do so unless enjoined by the court in this cause; that after said judgment was rendered, to wit, on the 28th day of June, 1875, the said William J. Krug, Edwin Clark, and the plaintiff met together at the office of the clerk of the court rendering the judgment, when said clerk, by one James B. Crawford, his deputy, made the following entry on the lower margin of the record of said judgment, and at the proper place, to wit: "We, the undersigned, hereby acknowledge ourselves replevin bail for stay of execution on the above judgment for the payment of the same, together with interest and costs accrued and to accrue, June 28, 1875;" that the said William J. Krug and Edwin Clark signed said entry of replevin bail, and the said Edwin Clark, in the presence and by the consent and direction of the plaintiff, signed the plaintiff's name to said entry of replevin bail; that said entry was then and there taken and approved by the said clerk in the following words, written opposite said signatures: "Taken and approved by me, J. M. Vance, Clerk. Attest, J. B. Crawford." That the plaintiff did not sign his name to said entry of replevin bail otherwise than as above stated; that the plaintiff could not write his name and was accustomed to making his mark when he signed his name himself.

As a conclusion of law, the court held that the entry of replevin bail set out as above was valid against and binding upon the plaintiff, and that he was not entitled to the relief prayed for in his complaint. To this conclusion of law the plaintiff excepted, but, nothwithstanding, the court rendered judgment thereon in favor of the defendants.

The only question presented here is, did the court err in its conclusion of law from the facts as found by it?

Section 421 of the code, 2 R. S. 1876, p. 202, which has reference to the recognizance of bail for the stay of execution, provides that "The recognizance shall be written immediately following the entry of the judgment, and signed by the bail."

The act, in relation to the construction of statutes, enacts that "The words 'written' and 'in writing' shall include printing, lithographing, or other mode of representing words and letters. But in

[illegible] where the written signature of any person is required, the [illegible] of such person or his mark shall be intended."

[illegible], p. 315, § 1, clause 6.

[illegible] point urged by the appellant considered in its natural [illegible] that, apart from these provisions of the statutes or the facts [illegible] by the court, he cannot be held to have signed the recognizance or [illegible] but in this case, within the meaning of such [illegible] provisions.

[illegible] on Agency, page 57, section 51, which treating upon the [illegible] of an agent to bind his principal by an instrument in writing, says: "Thus although a person cannot ordinarily sign a deed [illegible] as the agent of another, without an authority given to him under [illegible] yet this is true only in the absence of the principal; for if the principal is present, and verbally or impliedly authorizes the agent [illegible] his hand to the deed, it becomes the deed of the principal; and [illegible] is delivered, to all intents and purposes, as binding upon him as if [illegible] had personally written and executed it. The distinction may seem [illegible] and refined; but it proceeds upon the ground that, where the principal is present, the act of signing and sealing is to be deemed [illegible] personal act, as much as if he held the pen and another person [illegible] held his hand and executed it on the deed."

The rule thus announced by Story is founded in reason, and well [illegible] by authority, and must be held to be decisive of this [illegible] upon the point urged by him as above. The fact *per se*, [illegible] *per se*, is a familiar reason in the law, and where the principal [illegible] present, causes another to sign his name to a written instrument, the signature is, in legal contemplation, in his handwriting.

The next and only remaining point urged by the appellant is that [illegible] Mary C. Upham had set out in the second finding is proper [illegible] grant of affidavit form to [illegible] within the subscribing [illegible] of the statutes, but that evidence is fully answered by the case [illegible] The Commercial National Bank *v.* Cochran, 94 Ind. 205, in which [illegible] much more informal recognizances of replevin have been held to be [illegible] and binding upon those who signed it.

The judgment is affirmed, with costs.

[illegible] Pinkney, Agency, § 104, p. 97.

[illegible] Story, Promissory Notes, § 140, p. 97.

[illegible] Story, Promissory Notes, § 140, p. 97.

[illegible] Story, Promissory Notes, § 140, p. 97.

all cases where the written signature of any person is required, the proper handwriting of such person or his mark shall be intended." 2 R. S. 1876, p. 315, § 1, clause 9.

The first point urged by the appellant, considered in its natural order is, that, applying these provisions of the statutes to the facts as found by the court, he cannot be held to have signed the recognizance of replevin bail in this case, within the meaning of such statutory provisions.

Story on Agency, page 57, section 51, while treating upon the general power of an agent to bind his principal by an instrument in writing, says: "For although a person cannot ordinarily sign a deed for and as the agent of another, without an authority given to him under seal; yet this is true only in the absence of the principal; for if the principal is present, and verbally or impliedly authorizes the agent to fix his name to the deed, it becomes the deed of the principal; and it is deemed, to all intents and purposes, as binding upon him as if he had personally sealed and executed it. The distinction may seem nice and refined; but it proceeds upon the ground that, where the principal is present, the act of signing and sealing is to be deemed his personal act, as much as if he held the pen, and another person guided his hand and pressed it on the seal."

The rule thus announced by Story is founded in justice, and well sustained by authority, and must be held to be decisive against the appellant upon the point urged by him as above. *Qui facit per alium, facit per se,* is a familiar maxim of the law, and where one person, being present, causes another to sign his name to a written instrument, the signature is, in legal contemplation, in his handwriting.

The next and only remaining point urged by the appellant is, that the entry of replevin bail set out in the special finding is inoperative, for want of sufficient form to bring it within the substantial provisions of the statute; but that objection is fully answered by the case of The Vincennes National Bank v. Cockrum, 64 Ind. 229, in which a much more informal recognizance of replevin bail was held to be valid and binding upon those who signed it.

The judgment is affirmed with costs.[1]

[1] *Accord:* Hudson v. Revett, 5 Bing. 368.

"If one having testamentary capacity is unable from palsy or other cause to steady his hand so as to make to his will the signature required by law, another person may hold his hand and aid him in so doing; and it is not necessary to prove any request from the testator for such assistance. The act is his own with the assistance of another, and not the act of another under authority from him." Per Curiam, Vandruff v. Rinehart, 29 Pa. St. 232, 234.

Section 2.—Express Authority.

PEABODY v. HOARD.

1867. Supreme Court of Illinois. 46 Ill. 242.

Walker, J.—This was a bill in chancery, filed by Francis B. Peabody, in the superior court of Chicago, against Samuel Hoard and Henry F. Balch, to enjoin Hoard from prosecuting an action of ejectment which he had commenced in that court against the tenant of appellant, for the recovery of eighty acres of land. It appears from the record that Henry F. Balch, prior to the 24th day of August, 1853, owned the land in controversy. That he being in immediate need of money, and residing in Salem, Massachusetts, on the 14th day of March (the year is not given), wrote a letter to his brother, Moses P. Balch, in which he authorized him to sell the land. He directed him to sell it, if he could get $225 for the prairie, and $25 for the timber land; and all over that price he authorized him to retain for his trouble. He says: "I shall want all the money I can scrape together to pay my way through." From other evidence it seems that this letter was written in March, 1851.

It further appears that Moses owned an adjoining eighty-acre tract which he had bought of one Hall, and was paying him five per cent. per month as interest on $300 of the purchase money. He was anxious to get rid of this debt, and offered to sell his own eighty-acre tract to one Smith, but he would not purchase without he could at the same time obtain the eighty acres belonging to Henry F. Balch. A sale was, however, finally made by Moses to Smith of both eighties, and it was so arranged that Smith paid Hall the $300 debt, with interest already accrued. This payment was thus made, and the $300 incumbrance to Hall removed from Moses' eighty acres, and the balance of $750 was paid to Moses in jewelry. Hall conveyed the eighty acres belonging to Moses, for which he held the legal title, to Smith, and Moses, as the attorney in fact of Henry F. Balch, conveyed to him Henry's eighty acres.

It appears that Moses lived upon his and that Henry's was unimproved land; but it appears that Smith removed to the eighty purchased of Moses, and subsequently fenced the tract which had belonged to Henry. In March, 1860, appellant purchased and paid Henry F. Balch for the land, with no other or further notice than such as arises from adverse possession. In June, 1860, Smith having previously died, appellant purchased the land at a sale made by Smith's administrator, and paid $96 as the consideration. Probst was a tenant, in possession under the heirs of Smith; he subsequently attorned to both appellee and appellant, but appellee afterward brought the action of ejectment, to restrain the prosecution of which the bill was filed.

Section 2.—Express Authority.

[illegible]

[illegible] 46 Ill. 242

The evidence discloses the fact that Smith, before purchasing, advised with an attorney, who informed him that Moses could not make a valid conveyance under the letter as a power of attorney, and informed him that if he purchased, he would have to run the risk of getting Henry F. Balch to ratify it. He, acting on this advice, took from Moses a bond, in which he bound himself to procure a deed from Henry for the land, conveying it to Smith, within "one year and fifteen months," and in case of failure he was to be liable to pay Smith $800, as liquidated damages, and upon his paying that sum, Smith was to quitclaim the land to Henry. Moses never procured the deed and did not pay the liquidated damages.

It also appears that Smith paid to Hall $500, and to Moses the balance in watches and jewelry. And upon this state of facts the question is raised whether appellant is entitled to the relief sought by his bill.

It is undoubtedly true that the letter of Henry F. Balch to his brother Moses gave the latter authority to contract for the sale of the land. To this effect are the cases of Doty v. Wilder, 15 Ill. 407, and Johnson v. Dodge, 17 Ill. 433. It was there held that when a party by parol authorizes another to make a contract for the sale of land, if the authority is pursued, and a written agreement is entered into by the agent, a court of equity will enforce the performance of the agreement, and that such a case is not within the statute of frauds. But it was held in the latter of these cases that a power to convey land must be in writing, and of equal dignity with the deed to be executed. By the letter Moses was authorized to sell at the price specified, but while the authority was in writing it was not under seal, and consequently the deed made by him, as attorney for Henry, was inoperative to convey the title.

When, however, the whole of the letter is considered it is apparent that Henry contemplated a speedy sale, and only intended to empower his brother to sell in a short time from its date. He did not contemplate a sale years afterward, or even many months. This is apparent from the fact that he says that he "wants all the money he can scrape together to pay his way through." He speaks in the present tense. He says he then wants it; not that he shall want it at some future time. It, however, appears that the sale was not made until two years and five months after he received the authority.

Smith was bound at his peril to see the authority of the agent before he purchased, and in this case did see it, and not only so, but took legal advice upon it, and was informed that it was insufficient; that if he purchased he would have to run the risk of getting it confirmed by the owner. He seems to have concurred in the opinion of the attorney, inasmuch as he took from the agent a bond to indemnify him against loss growing out of the purchase. He could see and must have known that the letter required a speedy sale, and yet he purchased almost two years and a half afterward. The avenues

of information were open to him and he availed himself of them, as he was bound to do in dealing with an agent. He had no pretense even that he was imposed upon, as he was informed that he would acquire no title by the purchase. Yet, knowing these facts, he chose to risk the chances of getting the sale confirmed; or, failing in that, in obtaining indemnity from the agent. Failing to get a ratification, he only had the right to look to his bond for indemnity.

In this case the letter only authorized a sale for money. It speaks of so many dollars as the price for which the sale could be made, and he says he "wants to scrape together all the money he can to pay his way." There is no pretense that either Smith or Moses P. Balch could have understood that the sale could be made for watches. Yet it seems it was. It is true that $500 was paid in money, yet Moses sold his improved tract with the other, and appropriated the $500 to pay the balance of the purchase-money he owed on his tract, which Smith paid to Hall in person. Without a payment of that amount he could not obtain a release from Hall. It would therefore seem that this land was paid for in watches, and such a payment was not authorized by the letter.

Smith having acquired no title by his deed, nor any right to a specific performance of the unauthorized act of Moses Balch, his heirs and assigns could succeed to no better title than he held. The purchaser at the administrator's sale had the means of learning the nature and extent of Smith's claim; and in a matter of such importance the presumption would be that he became fully informed before he purchased. He then cannot urge that any fraud was perpetrated upon him. He no doubt examined the title and learned its character before he purchased. If so, he ran all risks of losing the land, and he is without any equitable remedy. The court below, therefore, acted properly in dismissing complainant's bill for the want of equity, and the decree must be affirmed.

Decree affirmed.[1]

STEWART v. PICKERING et al.

1887. Supreme Court of Iowa. 73 Ia. 652.

Action to recover money received by the defendants for lands sold by them for the plaintiff, and which they refused to pay over, because, as they claim, they sold certain other lands as the plaintiff's

[1] "It is not claimed that an agent for the payment of taxes cannot be appointed by parol. A request by letter or orally would be sufficient to authorize the person requested to act, and a payment made pursuant to such request would be a payment by the person making the request." Scholfield, C. J., in Paris v. Lewis, 85 Ill. 597, 599.

In Patterson v. Keystone Mining Co., 30 Cal. 360, it was held that a verbal appointment of an agent to execute a bill of sale of a mining claim was valid.

agent, and were therefore entitled to refund the money so improperly received for making the unauthorized sales. Held to the court: Judgment for the plaintiff and defendants appeal.

Statement.—The plaintiff resides in Pennsylvania and the defendants in Iowa. The latter are real estate brokers, and wrote to a person in Falls City, in the former state, [illegible] authorized to act for the plaintiff, a letter which was as follows: "We can [illegible] Corner in the Lease in this county belonging to [illegible] Mrs. A. Stewart. [illegible] to [illegible] day we got [illegible] [illegible] light, as can possibly find a customer for you for [illegible] [illegible] from you at its price." [illegible] inquire as to [illegible] [illegible] advise you a [illegible] of [illegible] [illegible] [illegible] matter is the [illegible] of Dan A. Stewart, deceased, and is the [illegible] devise by will which was executed in [illegible] [illegible] executor of my father and acted as [illegible] [illegible] [illegible] papers are all nearly clear and good." According to the letter is the following: "Written [illegible] Winnebago county, Iowa." [illegible] follows a list of the land, with the prices at which it is for sale. "Apply to D. Stewart, Falls City, Pa., or 1250 at St. Washington, D. C. Taxes are small; about balance in five years [illegible] payments with the [illegible] interest on all together for $475 per acre."

The amount in controversy being less than $500 we are asked to determine whether the foregoing correspondence, or any part thereof, contains any authority to sell the lands which could bind the plaintiff, providing the sale was made on the terms therein mentioned. We hold it does not. If accounts could be so sold, with directions to apply at the nearest durgin market. There is no authority given the defendants to sell the lands at the prices and on the terms named. If such authority was understood it was [illegible] and should be so [illegible] was recommended. [illegible] wrote the offer to the defendant read: "You may sell the lands on the terms named, subject to my approval." The latter must be understood [illegible] no authority to sell was given. It is due to the plaintiff to [illegible] that she refused to have sold the lands through another broker before she was notified of the sale made by the defendants.

(Reversed.)

CHEEVER v. KRITCHELOW.

(Supreme Court of Washington. [illegible] Wash. 186.)

[illegible] from superior court, King county.

Action [illegible] acknowledgment executed and delivered to another a contract in writing in the printed form as follows: [illegible]

[illegible] Whereas, Cheever [illegible] Co., of [illegible] [illegible] [illegible] and authority [illegible] [illegible] [illegible] [illegible]

agent, and were therefore entitled to retain the money as compensation for making the last-named sales. Trial to the court, judgment for the plaintiff, and defendants appeal.

SEEVERS, J.—The plaintiff resides in Pennsylvania, and the defendants in Iowa. The latter are real estate brokers, and wrote to a person in Falls City, in the former state, who was authorized to act for the plaintiff, a letter, which was as follows: "Do you have charge of the lands in this county belonging to the estate of Hon. A. Stewart? If so, are they for sale? * * * If the title is all right, we can possibly find a customer for the list this year. Let us hear from you as to price," etc. The reply thereto is as follows: "I herewith inclose you a price-list of our land in your county. * * * My mother is the widow of Hon. A. Stewart, deceased, and is the sole devisee by will, which was recorded in your county in 1879. I am executor of my father and attorney of fact of my mother. The titles are all strictly clear and good." Attached to the letter is the following: "Western land for sale, Winnebago county, Iowa." Here follows a list of the land, with the prices at which it is for sale. "Apply to D. Stewart, Falls City, Pa., or 1450 2d St., Washington, D. C. Terms one-fourth down, balance in four equal annual payments, with five per cent. interest, or all together for $4.75 per acre."

The amount in controversy being less than $100 we are asked to determine whether the foregoing correspondence, on the face thereof, contains any authority to sell the lands which would bind the plaintiff, providing the sale was made on the terms therein mentioned. We think it does not. It amounts simply to an offer, with directions to apply to the person therein named. There is no authority given the defendants to sell the lands at the prices and on the terms named. If such authority was conferred, it was a continuing one until revoked, and this we do not believe was contemplated. At most, the offer to the defendant was: "You may sell the lands on the terms named, subject to my approval." The latter must be so understood, because no authority to sell was given. It is due to the plaintiff to state that she claims to have sold the lands through another broker before she was notified of the sale made by the defendants.

Affirmed.[1]

CHEZUM v. KREIGHBAUM.

1892. SUPREME COURT OF WASHINGTON. 4 Wash. 680.

APPEAL from superior court, King county.

HOYT, J.—Respondent executed and delivered to appellant a contract in writing in the words and figures as follows, to wit:

[1] In Howe Machine Company v. Clark, 15 Kan. 373, it was held that a parol authority may be proved by the testimony of the party claiming to be agent.

"November 29, 1889. Slaughter. This is to certify that I have this day given F. O. Chezum the exclusive sale of may lande for 60 days —E 1-2 of SE 1-4 an South W 1-4 of SE 1-4 Sec. 17 town 22 No. r. 4 E. to be solde for $6,000, tow $2,000, chash $2,000. Interest semi-annually one yeare and 2,000 two years, and said Chezum must git his comition above that. I hereby reserve 10 acres to be selected by me of the forty next the beche. N. KREIGHBAUM."

And the only question presented for our consideration on this appeal is as to the proper construction of said contract. Appellant contends that by virtue thereof he became entitled to an option which authorized him at any time within sixty days after the execution of said contract to demand and receive from the respondent a deed to himself, or any person named by him, of the premises described therein, on payment being made and security given as therein provided. He further contends that the respondent had no interest in any negotiations as between him and any other parties relating to said premises. On the other hand, it is contended by respondent that by said instrument in writing he simply constituted appellant his agent to make sale of the property in question upon the terms therein stated, and that in any negotiation which he had in relation thereto he acted simply as the agent of the respondent, and was entitled, out of any moneys he might realize over the sum of $6,000, provided for in the contract, to his reasonable commission, as full compensation for his services in the matter.

If the contract is to be construed as contended for by respondent, then it is clear that the appellant, under the pleadings in this action and the facts established at the trial, is not entitled to recover, and the action of the court below in sustaining the motion of the respondent for a judgment of nonsuit must be sustained. If, however, the contract is to be construed as contended for by appellant, it will be necessary for us to enter upon a consideration of other questions presented by the record, which it is claimed on the part of the respondent would establish the nullity of said contract, even although it be construed as contended for by appellant. There are no words used in said contract which in terms purport to give to the appellant any option to purchase the property therein described, nor are we able to gather from the whole instrument any such intent. On the other hand, there are apt words used to constitute the appellant the agent of the respondent in dealing with said property. He is to have "the exclusive sale of my lande for 60 days." These are the only words which tend in any manner to show the nature of the appellant's interest in said contract. The remainder thereof relates entirely to the conditions upon which, as such agent, respondent authorizes him to deal with the property. Construing the whole instrument together, and giving to each word therein used its full and ordinary interpretation, it simply confers upon the appellant the exclusive agency for the sale of the said property for the period of sixty days

at a price not less than $1,000, and the only exception on it is ordinary is the clause which provides that his commission, if any is to be made, must be paid out of the money received upon such sale over and above the sum of $1,000. It is nothing more than the ordinary contract for exclusive agency for the sale of property in which the price for which it is to be sold is to be a net price. Thus an agent authorized to sell property at a sum not less than a certain amount, which is to be net to the seller, acts in making the sale thereunder as the agent of the seller, and not as the principal, even as to profits. The owner of the property has fixed in his own mind the least sum which he is willing to take, and he therefore contracts with the agent that in asking for more he must have that sum in hand if coming out to him. But it does not follow from this that the agent, acting under such power, is entitled to other benefit of the good bargain which he may make for the owner than real damages for commission or other consideration under the contract may be measured. That such a contract, when it shows upon its face that no secrecy is required thereby, must be construed as above, is too clear to require the citation of authorities. If the party acts simply as agent, then the principal must get the benefit of his good bargain; and the fact that the conditions upon which he is willing to make the sale provide for a net, instead of a gross amount to the owner, can have no influence in changing the existence of the relation established by the contract. Courts are willing to construe a contract of this kind to be that of agency, rather than a mere matter on the part of the person acting thereunder, and however strong the language used by the owner may be in this, it is plain in connection with the contract which shows on its face to create an agency rather than to make a sale of the property, the person acting thereunder will not be allowed to get any benefit beyond what the real compensation as may be awarded to him by the contract.

In the case of Turney v. Wishart (Tex.) 14 S. W. Rep. 616, the language of the owner was: "I will take $7,000 net to me." Under the authority thereof a salesman made for the sum of $8,500. It was claimed on the part of the person who acted under and employed that he was entitled to the $500 received over and above the net price which the owner said he would take; but the court held otherwise, and intimated that the "$7,000 net to owner" was so much the property of the owner of the land as any part of the $7,000, that the owner was entitled to receive the entire $7,000, and that the person acting under and employed had a clear agency and was only for a reasonable consideration on such sale. This case is directly in point, and is followed in Wishart on the question [illegible] Tex. The [illegible] herein are stated quite [illegible] the remainder of the points claiming attention, but such opinion does not seem [illegible] necessary to a consideration of appellant's [illegible] with a definite declaration that the owner would take a certain price

at a price not less than $6,000, and the only expression out of the ordinary is the clause which provides that his commission, if any he is to have, must be made out of the moneys realized upon such sale over and above said sum of $6,000. It is nothing more than the ordinary contract for exclusive agency for the sale of property, in which the price for which it is to be sold it to be a net price. That an agent authorized to sell property at a sum not less than a certain amount, which is to be net to the seller, acts in making the sale thereunder as the agent of the seller, and not as the principal, seems to us clear. The owner of the property has fixed in his own mind the least sum which he is willing to take, and he, therefore, contracts with the agent that in acting for him he must have that sum in view as coming net to him. But it does not at all follow that the agent, acting under such power, is entitled to other benefit of the good bargain which he may make for the owner than that thereby his commission or other compensation under the contract may be increased. That such a contract, when it shows upon its face that an agency is created thereby, must be construed as above, is too clear to require the citation of authorities. If the party acts simply as agent, then his principal must get the benefit of his good bargain; and the fact that the conditions upon which he is forced to make the sale provide for a net, instead of a gross amount to the owner, can have no influence in changing the character of the relation established by the contract. Courts are inclined to construe a contract of this kind to be that of agency, rather than a simple option on the part of the person acting thereunder; and however strong the language used by the owner may be, yet if there is anything in connection with the contract which shows an intent to create an agency, rather than to make a sale of the property, the person acting thereunder will not be allowed to get any benefit therefrom other than such compensation as may be awarded to him by the contract.

In the case of Turnley v. Michael (Tex.), 15 S. W. Rep. 912, the language of the owner was, "I will take $7,500 net to me." Under the authority thereof a sale was made for the sum of $8,000. It was claimed on the part of the person who acted under said contract that he was entitled to the $500 received over and above the net price which the owner said he would take; but the court held otherwise, and adjudged that the $500 thus received was as much the property of the owner of the land as any part of the $7,500; that the owner was entitled to receive the entire $8,000, and that the person acting under said contract had a claim against such owner for a reasonable commission on such sale. This case is directly in point, and, if followed, is decisive of the question under consideration. The contract therein construed much better warranted the contention of the person claiming adversely to such decision than does the one here authorize the contention of appellant. There, there was a definite statement that the owner would take a certain net sum,

and it was not coupled with any condition as to the agent being authorized to sell for that sum. Here the agent is directly authorized to sell the property, and a certain net sum is fixed upon as a part of the condition under which he is authorized to make the sale. The cases of Kramer v. Winslow (Pa.), 18 Atl. Rep. 923, and Blanchard v. Jones, 101 Ind. 542, though not so directly in point as the one above cited, tend strongly to establish the doctrine contended for by respondent.

On the other side, there has not been a single case called to our attention which seems to us in point upon the precise question which we are here called upon to decide. In our opinion, the appellant, when acting under the power conferred by said written instrument, acted not for himself as principal, but simply as the agent of the respondent, and, such being the case, as we have seen, he could not, under the circumstances disclosed, recover any compensation.

The judgment of the court below must be affirmed.

ANDERS, C. J., and SCOTT and STILES, JJ., concur.

DUNBAR, J.—I dissent. I do not think that any of the cases cited by respondent are in point. Here are two persons legally competent to contract, and the contract is one they had a right to make. If the respondent had seen fit to do so, he might have contracted that he would pay $10,000, or any sum to sell his land for the sum of $6,000, and the law would enforce the payment of the price agreed to be paid if appellant had sold the land. The law will leave the parties to make their own contracts, and, after they are made, it will enforce them. This is not so much a question of agency as a question of employment. Nor is it true that, as between the contracting parties, the sale is made for the benefit of the landowner. The sale, if made, is made for the mutual benefit of both. This is not a written contract for the sale of land where the agent gets a commission on the amount of money obtained. The owner here has seen fit to make a contract with special provisions in his own interest. He said, in substance, to the agent, "If you will sell this land within sixty days, you can have for your services all you can get for it over six thousand dollars, be that much or little;" and he should be compelled to do what he agreed to do. This employment was taken on the doctrine of chances. No matter how much labor or money might have been expended by the appellant in an effort to sell the land, if he had failed to make the sale he could have recovered nothing. Respondent had protected himself by his contract, and he ought not to complain if the chances turned to the benefit of the appellant.[1]

[1] See Robinson v. Easton, Eldridge & Co., 93 Cal. 80.

Section 3—Implied Authority.

GRAVES v. HORTON

1885. Supreme Court of Washington. 28 Pacific, 66.

APPEAL by defendant from a judgment of the district court for Kennedy county, where the action was tried before L. Sweeden, Jr., and a jury, and plaintiff had a verdict. The defendant moved for a new trial on the ground that the verdict was not sustained by the evidence, and the motion was denied.

In addition to the facts recited in the opinion, it appeared from the testimony of the plaintiff that he purchased the property in controversy from the defendant at Cheney, on January 1, 1883, receiving a bill of sales that he did not show or offer to anything with the property at the time and did not go down to Spirit Lake, where the property was situated, till May, 1883, when he was handed a telegram by F. V. Horton, which had been received from Spirit Lake, and stated that McCurdy was leaving down the road, that the telegram was a month old when handed to him, and that when he reached Spirit Lake he could not find the property, and found that the boundary to which it was supposed to be had been moved away. McCurdy testified that he purchased the property in question from the defendant through F. M. Horton, as her agent, that he took possession of it, and disposed of it, continuing to do such disposition he made of it, and that as a part of the consideration of his purchase he conveyed eighty acres of land in Iowa, the conveyance being made to Cynthia W. Horton (wife of F. M. Horton) under F. M. Horton's instructions.

STRAHAN, J.—This action was brought to recover the value of certain property, which plaintiff had exchanged with defendant for a dancing rink, dishes, boats, etc., situated at Spirit Lake, Iowa. Plaintiff's claim is that there was an entire failure of title to the property, because defendant had previously sold it to one McCurdy. It is not claimed that defendant had personally sold it to McCurdy, whatever was done in that regard having been done by one F. M. Horton, assuming to act as her agent. Hence, unless F. M. Horton had authority as defendant's agent to sell to McCurdy, there cannot have been any such sale, and plaintiff can recover. The burden was on plaintiff to prove such agency.

It is a maxim of the law of agency that no one can become our agent except by the act of the principal, either express or implied from particular circumstances, like an agent myself to receive or himself an assistant to do a particular act by my permittance, and that the authority of an agent cannot be proved by his own declarations that he is such. Applying these elementary principles, and supposing the evidence of all that is asserted to be competent,

Section 3.—Implied Authority.

GRAVES v. HORTON.

1887. SUPREME COURT OF MINNESOTA. 38 Minn. 66.

APPEAL by defendant from a judgment of the district court for Hennepin county, where the action was tried before LOCHREN, J., and a jury, and plaintiff had a verdict. The defendant moved for a new trial on the ground that the verdict was not justified by the evidence, and the motion was denied.

In addition to the facts recited in the opinion, it appeared from the testimony of the plaintiff that he purchased the property in question from the defendant, in Minneapolis, in January, 1886, receiving a bill of sale; that he did not think he could do anything with the property at the time, and did not go down to Spirit Lake, where the property was situated, till May, 1886, when he was handed a telegram by T. V. Horton, which had been received from Spirit Lake, and stated that McCurdy was tearing down the rink; that the telegram was a month old when handed to him, and that when he reached Spirit Lake he could not find the property, and found that the buildings in which it was supposed to be had been moved away. McCurdy testified that he purchased the property in question from the defendant through F. M. Horton, as her agent; that he took possession of it and disposed of it (refusing to state what disposition he made of it), and that, as a part of the consideration on his purchase, he conveyed eighty acres of land in Iowa, the conveyance being made to Caroline W. Horton (wife of F. M. Horton) under F. M. Horton's instructions.

MITCHELL, J.—This action was brought to recover the value of certain property, which plaintiff had exchanged with defendant for a skating rink, skates, boats, etc., situated at Spirit Lake, Iowa. Plaintiff's claim is that there was an entire failure of title to this (latter) property, because defendant had previously sold it to one McCurdy. It is not claimed that defendant had personally sold it to McCurdy, whatever was done in that regard having been done by one F. M. Horton, assuming to act as her agent. Hence, unless F. M. Horton had authority as defendant's agent to sell to McCurdy, there could have been no such sale, and plaintiff has no cause of action. The burden was on plaintiff to prove such agency.

It is axiomatic in the law of agency that no one can become the agent of another except by the will of the principal, either expressed or implied from particular circumstances; that an agent cannot create in himself an authority to do a particular act by its performance, and that the authority of an agent cannot be proved by his own statement that he is such. Applying these elementary principles, and stripping the evidence of all that is immaterial or incompetent,

and giving to what remains all the force that can be claimed for it, all there is that was brought home to defendant tending to prove any such agency is that, when F. M. Horton was in Spirit Lake, he transmitted and submitted to her in Minneapolis what purported to be a proposition from McCurdy to give for this property $1,090 in goods, and assume a mortgage on it for $385, and that she agreed to accept this proposition; that McCurdy being unable to carry this out, F. M. Horton submitted to her another proposition as coming from McCurdy, viz., to give in place of the goods eighty acres of land in Iowa; that defendant declined to accept this last proposition, and so notified McCurdy; that about two weeks after this she authorized F. M. Horton to negotiate the sale of this property to plaintiff on the terms which were finally agreed on, she herself making the transfer by executing the bill of sale described in the complaint. We have, on the other hand, the flat denials of both defendant and F. M. Horton that he ever had any authority from her to sell this property or ever was her agent for this or any other purpose.

This is really all the competent evidence there is at all bearing upon this question of agency. The acceptance of McCurdy's first proposition, which he was unable to carry out, certainly does not tend to prove authority to F. M. Horton to sell on the terms of the second, which defendant expressly declined to accept; and if any sale ever was made to McCurdy, it was on the basis of this last proposition. Hence the evidence of agency is reduced down to the fact that defendant authorized F. M. Horton to negotiate the sale to plaintiff, which she herself consummated by the execution of a bill of sale. It certainly cannot be that this is sufficient. It is true that agency may be proved from the habit and course of dealing between the parties, that is, if one has usually or frequently employed another to do certain acts for him, or has usually ratified such acts when done by him, such person becomes his implied agent to do *such acts*, as, for example, the case of the manager of a plantation in buying supplies for it, or the superintendent of a saw-mill, in making contracts for putting in logs for the use of the mill, which are the cases cited by respondent. It is also true, as was said in Wilcox v. Chicago, Mil. & St. Paul R. Co., 24 Minn. 269 (which involved the question of the authority of the person to whom goods were delivered to receive them), that a single act of an assumed agent, and a single recognition of it, may be of so unequivocal and of so positive and comprehensive a character as to place the authority of the agent to do *similar* acts for the principal beyond question. It is also true that the performance of subsequent as well as prior acts, authorized or ratified by the principal, may be evidence of agency, where the acts are of a similar kind, and related to a continuous series of acts embracing the time of the act in controversy, as indicating a general habit and course of dealing; as, for example, the acts embracing the time of the act in controversy, as indicating

a general habit and course of dealing; as, for example, the acts of the president of a railway company in making drafts in the name of the company, which were honored by it, which was the case of Olcott v. Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298, cited by counsel. But we think the books will be searched in vain for a case where it was ever held that authority to negotiate for the sale of property to one person at one time, on certain terms, the transfer to be made by the principal in person, was evidence of authority to sell and transfer the same property at some former time to another person on different terms. * * *

A new trial would, however, have to be granted on the ground of error in the admission of evidence. The general statement of the witness McCurdy that Frank M. Horton did quite an extensive business at Spirit Lake, trading in real estate, and frequently bought and sold in the name of Jennie L. Horton and Carolina W. Horton, without identifying the transaction, or describing them, or in any way bringing them home to the notice or knowledge of defendant, was inadmissible to prove agency. The court also erred in allowing the same witness to testify that F. M. Horton was publicly and generally known at Spirit Lake as the agent of Jennie L. Horton. Agency cannot be proved by general reputation.

Judgment reversed, and new trial ordered.[1]

BRYAN v. JACKSON.

1822. SUPREME COURT OF ERRORS OF CONNECTICUT. 4 Conn. 288.

THE plaintiff's account consisted of articles delivered to, and work done for Oliver P. Jackson, a minor son of the defendant and a stu-

[1] "But upon the facts reported in this case, there was an agency in fact arising from the absence of the husband, and from his having left his wife with the care of the family and in the management of his affairs at home. The agency, however, was not unlimited. The power must be construed in reference to the nature and extent of the business affairs entrusted to her charge." Peck, J., in Meader v. Page, 39 Vt. 306, 309.

"One partner has an implied authority to bind the firm by simple contracts relating to the partnership, and within the scope of the regular partnership business. In such cases, the act of each partner is regarded as the act of all. But guaranties of the debts of others, and notes or bills of exchange made or endorsed for the accommodation of others, or as surety for others, are out of the scope of the business of a trading firm. Whatever the English law may formerly have been, as to guaranties, we consider it now settled, in England as well as in the United States, that one party cannot bind the firm by a guaranty of the debt of another, without a special authority for that purpose, or an authority to be implied from the common course of the business of the firm, or the previous course of dealing between the parties, unless the guaranty be afterward adopted and acted upon by the firm." Metcalf, J., in Sweetser v. French, 2 Cush. (Mass.) 309, 313.

dent in Yale College; which account accrued between the 22d of June and the 11th of September, 1818; and the question was, whether the defendant was liable for it. The plaintiff did not claim that the defendant's son was in *need* of the articles charged, so that they were *necessaries* for him; or that the defendant had given any *express* authority to his son to contract the debt. It was proved that on the 20th of June, 1818, the defendant gave to his son $135, with direction to pay the money to the plaintiff on an account, of the same nature with the one in question, for articles delivered to and work done for such son, without objecting to the account, or giving any notice to the plaintiff not to trust his son any further; and that the defendant then gave positive orders to his son to contract no more debts, and received from him a positive assurance that he would not. At the same time the defendant placed his son under the care of Nathaniel Rossiter, Esq., with direction to furnish him with everything necessary and suitable for him.

The plaintiff insisted that the articles were delivered and the work done for the defendant's son, by the authority and consent of the defendant; and in support of this claim, the plaintiff offered himself as a witness, to swear, that the defendant said, after the delivery of the articles, and after the last charge in the account, that he, the defendant, had got the plaintiff's bill; that he should have notified the plaintiff not to trust him, on his son's account, when he paid the former bill, but did not wish to hurt his son's feelings; that he found no fault with the bill, but wished to stop his son's extravagance, and, for that reason, refused to pay his bills, at that time; and that he had once given his son money to pay the plaintiff's bill, but he had spent it. To the admission of this evidence the defendant objected, on the ground that the plaintiff was an incompetent witness to testify to such declarations. The judge overruled the objection, and admitted the evidence.

The plaintiff having obtained a verdict, the defendant moved for a new trial, on the ground that the decision of the judge, above stated, was erroneous.

Hosmer, Ch. J.—I am of opinion, from the facts apparent on the motion, that O. P. Jackson had an implied general authority from the defendant to contract on his credit with the plaintiff; and that the testimony of the plaintiff, in this case, was correctly admitted.

Without any express authority having been conferred on him by the defendant, O. P. Jackson had procured of the plaintiff articles similar to those which constitute the present book debt. Of the debt thus contracted, the defendant made payment "without objecting to the same, or giving any notice to the plaintiff, not to trust his son any further." To his son the defendant gave a positive prohibition against contracting debts, and placed him under the care of Mr. Rossiter, but no information of this was communicated to the plaintiff. The above facts amount to an authority imparted to the de-

servant's son, so far as the plaintiff is concerned; and on this supposition he was entitled to say: "If I once pay," says Christian, J. (in Comyn 490), "for what my servant has bought upon trust, without knowing any disapprobation of it, it is equivalent to a direction to find him in liquor," and this opinion of a very learned lawyer is in conformity to established decisions. The case of Fleet v. Perrit[well], 1 Bronnow 401, gives the length of the principle declared by the notice of Sir William Blackstone, and in the text to which that is subjoined the author has said, "If I send my servant somewhere on trust, and sometimes with ready money, I am answerable for all he takes up; for the tradesman cannot possibly distinguish when he comes by my order, and when upon his own account." All these principles have their foundation in unquestionable justice and policy; and, therefore, it is clear in law, where the possession of another, who is a son or a servant, are recognized as the property of those, who is justly considered responsible for a servant's contracts.

The questions to witness at the plaintiff to the declarations of the defendant, after the account in question had accrued, got had been excluded, if competent, was unquestionably relevant. It seems that the defendant was restrained from giving notice to the plaintiff not to trust his son, lest he should hurt his feelings; that while the bill he found no fault, but wishing to stop his son's extravagance, he had declined paying it, and that he had given money to his son to pay the plaintiff's bill, which he had expended. Testimony of this sort plainly weighed something, and was proper for the consideration of the jury, upon the question, whether sufficient had been given to counter the debt in controversy.

New trial not to be granted.

BAGLEY v. PINDLAY

1800. Supreme Court of Judicature. 2 Yeates 520.

[Debt.] J.—This was an action of assumpsit by Bagley against Pindlay for damages for a breach of contract in refusing to receive

[illegible]

fendant's son, so far as the plaintiff is concerned; and on this supposition he was warranted to act. "If I once pay" (says Christian, 1 Bla. Comm. 430) "for what my servant has bought upon trust, without expressing any disapprobation of it, it is equivalent to a direction to trust him in future;" and this opinion of a very learned lawyer is in conformity to established decisions. The case of Hazard v. Treadwell, 1 Strange 506, goes the length of the principle declared by the editor of Sir William Blackstone; and in the text, to which that is subjoined, the author has said: "If I send my servant sometimes on trust, and sometimes with ready money, I am answerable for all he takes up; for the tradesman cannot possibly distinguish when he comes by my order, and when upon his own authority." All these principles have their foundation in unquestionable justice and policy; and, therefore, it is that by law, where the contracts of another, who is a son or a servant, are recognized, by the payment of them, this is justly considered equivalent to a general command.

The admitted testimony of the plaintiff to the declaration of the defendant, after the account in question had accrued and had been delivered, if competent, was unquestionably relevant. It seems that the defendant was restrained from giving notice to the plaintiff not to trust his son, lest he should hurt his feelings; that with the bill he found no fault; but wishing to stop his son's extravagance, he had declined paying it, and that he had given money to his son to pay the plaintiff's bill, which he had expended. Testimony of this description weighed something, and was proper for the consideration of the jury, upon the inquiry, whether authority had been given to contract the debt in controversy.[1] * * *

New trial not to be granted.[2]

BAGLEY v. FINDLAY.

1876. Supreme Court of Illinois. 82 Ill. 524.

Dickey, J.—This was an action of assumpsit by Findlay against appellant for damages for breach of contract in refusing to receive

[1] A portion of the opinion dealing with a question of testimony is omitted.

[2] "No action can be maintained against a father for goods purchased on his credit by his minor child, even though they be necessaries, unless the father has expressly or impliedly authorized the purchase on his credit. The authority of an infant to bind the father by contract for necessaries may be inferred from slight evidence." Depue, J., in Freeman v. Robinson, 38 N. J. L. 383, 384.

Regarding the power of a wife to pledge her husband's credit for necessaries, see Benjamin v. Dockham, 134 Mass. 418.

and pay for goods sold by appellee to appellant, the delivery of which was offered. The goods in question were part of them in Chicago and part of them in Milwaukee. Soon after the refusal of appellant to accept the goods appellee gave him notice that he would proceed to sell the goods to the best advantage and hold appellant responsible for all losses, if any. After this, appellant was again requested to accept the goods. The goods were sold. The net proceeds of this sale fell short of the contract price to the amount of $1,629.86, not including $402.62, expenses for commissions and charges. The issue was, by consent, tried without the intervention of a jury. The finding was for appellee, and his damages were assessed at $1,629.86, and judgment thereon.

It is contended by appellant that the measure of damages adopted by the court below was wrong.

When a vendee of goods sold at a specific price refuses to take and pay for the goods, the vendor may store the goods for the vendee, give him notice that he has done so, and then recover the full contract price, or he may keep the goods and recover the excess of the contract price over and above the market price of the goods at the time and place of delivery, and this means the market price of such goods in such condition and in such quantity as the goods were at the time for delivery. In such case, if goods are bought in large quantities, the market price at retail is not the standard, but the market price in large quantities; or the vendor may, giving notice to the vendee, proceed to sell the goods, in their then condition and quantity, to the best advantage, and recover of the vendee the loss, if the goods fail to bring the amount of the contract price. The appellee adopted the latter course, and the only question of fact presented is, were the goods sold to the best advantage.

In such case the vendor takes the position of agent for the vendee, and is held to the same degree of care, judgment and fidelity that is imposed by the law upon an agent put in the custody of such goods in such condition, with instructions to sell them to the best advantage.

Without reviewing the evidence in this case, it is sufficient for us to say that the evidence fully sustains the finding of the court—that the goods were fairly sold, with reasonable diligence, judgment and care.

Appellant insists that the sale must, in such case, be in the market where the goods are and objects that the goods stored in Milwaukee were sold in Chicago. The purchaser was found in Chicago, but he bought the goods in their then condition in store in Milwaukee, and if these goods were taken to Chicago at all, it was after the sale.

The appellant has no just cause of complaint against the finding of the court. Upon the evidence shown in the record, the court below might, without impropriety, have included in the assessment of

damages for such expenses incurred by the appellee for transportation and charges incurred in making the sale.

The judgment of the court below is affirmed.

Judgment affirmed.

Section 4—Acceptance by Agent

FIRST NATIONAL BANK OF ALBIA v. TREE

1887. Supreme Court of Iowa. 73 Iowa 132.

Action upon a promissory note. The defendant pleaded certain facts as constituting specially a defense. The plaintiff demurred to the answer, and the demurrer was sustained. The defendant elected to stand upon his answer, and judgment was rendered for the plaintiff. The defendant appeals.

Adams, J.—The note was made payable at Albia, Iowa. The defendant averred in his answer in substance that before the note became due he dealt at Ioonion, with one Malkon, the consideration to pay the note, of which fact the plaintiff was notified; that the plaintiff issued at Albia, Iowa, then wrote to Malkon, at Ioonion, in these words: "We hold a note of $747 on John Tree payable at Ioonion, and we understand the money has been left with you for its payment. Now unless we [if you come to Albia, or if you rather get a check cashed by a reliable party, please send it to, and oblige." That Malkon held the money with the intent to either send it or take it to the plaintiff's bank before he had an opportunity to do so his house was broken into and the money was stolen.

II. The defendant contends that the answer shows that the plaintiff adopted Malkon as its agent, and that Malkon was holding for defendant as such agent at the time it was stolen. But in our opinion this position cannot be sustained. The plaintiff did, it is true, propose to Malkon that he should carry or send the money to Albia. If Malkon had undertaken to do so it may be that in doing so he would have been acting as the plaintiff's agent. But Malkon never did so agreed to act for the plaintiff. To constitute a person an agent there must be consent on the part of the agent, either expressed by words or inferable from something done. But in the case before us there appears to have been neither. We think that the demurrer was properly sustained. * * * *

Affirmed.

See also Lewis Bros. Co. v. Elias Drummond Shipbuilding Co. in the Appendix.

A promise to the agent not binding upon the principal. A agrees to convey to P or to whom P directs. P directs A to convey to X. A refuses to convey

damages the $402 expenses incurred by the appellee for commissions and charges incurred in making the sale.

The judgment of the court below is affirmed.

Judgment affirmed.[1]

Section 4.—Acceptance by Agent.

FIRST NATIONAL BANK OF ALBIA v. FREE.

1885. SUPREME COURT OF IOWA. 67 Iowa 11.

ACTION upon a promissory note. The defendant pleaded certain facts as constituting virtually a payment. The plaintiff demurred to the answer, and the demurrer was sustained. The defendant elected to stand upon his answer, and judgment was rendered for the plaintiff. The defendant appeals.

ADAMS, J.—I. The note was made payable at Iconium, Iowa. The defendant averred in his answer, in substance, that before the note became due he deposited at Iconium, with one Maiken, the amount necessary to pay the note, of which fact the plaintiff was notified; that the plaintiff, located at Albia, Iowa, then wrote to Maiken, at Iconium, in these words: "We hold a note of $147 on John Free, payable at Iconium, and we understand the money has been left with you for its payment. Next time any of you come to Albia, or if you sooner get a chance to send by a reliable party, please send it in, and oblige;" that Maiken held the money with the intent to either send it or take it to the plaintiff, but before he had an opportunity to do so his house was broken into and the money was stolen.

II. The defendant contends that the answer shows that the plaintiff adopted Maiken as its agent, and that Maiken was holding the money as such agent at the time it was stolen. But, in our opinion, this position cannot be sustained. The plaintiff did, it is true, propose to Maiken that he should carry or send the money to Albia. If Maiken had undertaken to do so, it may be that in doing so he would have been acting as the plaintiff's agent. But Maiken never acted nor agreed to act for the plaintiff. To constitute a person an agent, there must be consent on the part of the agent, either expressed by words or inferable from something done. But in this case there appears to have been neither. We think that the demurrer was rightly sustained.[2] * * *[3]

Affirmed.

[1] See St. Louis Range Co. v. Kline-Drummond Mercantile Co., 120 Mo. App. 438.

[2] A portion of the opinion not dealing with the subject of Agency is omitted.

[3] "No offer to employ another binds the person making it to pay for services

Section 5.—Estoppel.

LORD CRANWORTH, IN POLE v. LEASK.

1863. HOUSE OF LORDS. 33 L. J. Ch. 155.

My lords, before I examine in detail the facts of this case, I desire to advert very shortly to one or two general propositions connected with the law of agency which, I think, were sometimes lost sight of in the argument of this case at your lordship's bar. First, then, as to the constitution by the principal of another to act as his agent. No one can become the agent of another person except by the will of that other person. His will may be manifested in writing or orally, or simply by placing another in a situation in which, according to ordinary rules of law, or perhaps it would be more correct to say according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him; but, in every case, it is only by the will of the employer that an agency can be created.

This proposition, however, is not at variance with the doctrine that where one has so acted as from his conduct to lead another to believe that he has appointed some one to act as his agent, and knows that that other person is about to act on that behalf, then, unless he interposes, he will, in general, be estopped from disputing the agency, though in fact no agency really existed. It is, however, necessary to bear in mind the difference between this agency by estoppel, if I may so designate it, and a real agency, however constituted.[1]

unless he is given to understand that the offer is accepted." Cooley, J., in McDonald v. Boeing, 43 Mich. 394, 396.

[1] "In the present case it was a question of fact whether the defendant, by his acts and conduct, held out Michel to the plaintiffs as his agent, and whether, from such acts and conduct, the plaintiffs were led to believe, and did believe, that the defendant was the principal and relied on this in selling the goods in suit." Merwin, J., in Page v. Methfessel, 71 Hun (N. Y.) 442, 448.

"If the principal holds out an agent or servant as possessing authority to control a shop or place of business, and a third person acts upon the faith of the appearances so created, the principal may, in such a case as this, be bound by the acts of the apparent agent within the scope of his ostensible authority, although as between the agent and his employer no such authority in fact existed." Elliott, J., in Over v. Schiffling, 102 Ind. 191, 196.

See the following articles: "Agency by Estoppel," by Walter W. Cook, 5 Columbia Law Rev. 36; "Agency by Estoppel," by John S. Ewart, 5 *Ib.* 354; "Agency by Estoppel," by Walter W. Cook, 6 *Ib.* 34.

HARDIN v. ALEXANDRIA INSURANCE COMPANY.

1892. [Supreme Court of Appeals of Virginia. 90 Va. 413.

August 11 Wytheville. Decided at Richmond.

Appeal from decree of circuit court of Wise county, rendered at its December term, 1891, in chancery cause wherein J. M. Hardin, the appellant, was complainant and the Alexandria Insurance Company was defendant. The object of the suit was to compel the company to issue to the complainant a policy of insurance on a certain stock of merchandise pursuant to a contract theretofore made by the company with him, and to pay the loss thereon, amounting to $250, with interest from October 20, 1891. The court below dismissed his bill, with costs against him, and he appealed. Opinion states the case.

Fauntleroy, J., delivered the opinion of the court.

The facts which appear by the record are as follows: In November, 1891, one C. W. Lovell, whose occupation was general insurance business at Big Stone Gap, Wise county, Virginia, went to see W. S. Reese, who was about to embark in business upon his stock of liquors and bar fixtures, and asked the rate, and was told by Lovell that the rate was three per centum. Whereupon Reese instructed Lovell to write a policy for $1,000. Lovell went to his office, where he had the blank forms and instructions of the Alexandria Insurance Company, and filled in a policy, as instructed, for $750 insurance upon the stock of liquors, and for $250 insurance upon the bar fixtures, furniture, etc., and mailed it to the "Alexandria Insurance Company, Alexandria, Virginia." Lovell, in a few days, received from that company a policy covering the property with insurance of $750 on the stock of liquors and $250 on the bar fixtures, furniture, etc., in the two-story frame building, metal roof, on Wyandotte avenue, Big Stone Gap, Va., for one year from 12 M., November 25, 1890, to 12 M., November 25, 1891. This policy he delivered to the insured, W. S. Reese, and received from him the premium, at $10 for the Alexandria Insurance Company. On the second day of December, 1891, Lovell indorsed on this policy a permit for Reese, the insured, to remove the stock of liquors to a storehouse in rear of the original place, and mailed the said policy, thus indorsed, to the company for its approval. The company did approve the permit so indorsed by Lovell upon the said policy and returned it, with its approval, to Lovell, who delivered it to Reese. On the 9th day of May, 1892, Reese assigned this policy to J. M. Hardin, the appellant, by a writing, witnessed by Lovell, who also indorsed said policy as witnessed with the said assignment, on the 10th day of May, 1892, the Alexandria Insurance Company was apprised of said assignment, and returned it to Lovell, who delivered it to said Hardin. Then in May, 1892, the insured stock

Section 3.—Estoppel.

[illegible]

[illegible] before I continue to discuss the facts of this case, I desire to [illegible] some of the general propositions connected with the law of [illegible], I think, were sometimes lost sight of in the arguments addressed to your lordship's [illegible]. First, then, as to the constitution of the [illegible] of another to act as his agent. No one can become the agent of another person except by the will of that [illegible]. The will may be manifested in writing or orally, or [illegible] to suffer in a [illegible] in which, according to common [illegible], or perhaps it would be more correct to say [illegible] ordinary usages of mankind, that other is understood [illegible] for the person who has so placed him; but, as I [illegible], it rests on the will of the employer that an [illegible]

[illegible] is not at variance with the doctrine [illegible] as long as a man cannot so lend another to [illegible] to act as his agent, and knows [illegible] is acted on that behalf, there must be [illegible] to estoppel from disputing the [illegible] really existed. It is however, [illegible] between this agency by [illegible] and a real agency, however con-[illegible]

[illegible] to a person [illegible] that the offer is accepted." Cockburn, J., in [illegible]

[illegible] from P. was a question of fact whether the defendant, by his [illegible] held out [illegible] as his agent and whether, [illegible] were led to believe, and did believe [illegible] and acted on this in selling the [illegible] Lovell & Christmas, 27 Law J. (N. S.) 44; 4 [illegible]. [illegible] to a person assuming authority to [illegible] and that person acts upon the faith of [illegible] in such a case as this, he bound [illegible] the person who has held out such authority as in fact [illegible]

[illegible] Walter W. Cook, 5 [illegible] Lovell v. Evans, 5 *Ib.* 374. [illegible]

HARDIN v. ALEXANDRIA INSURANCE COMPANY.

1894. Supreme Court of Appeals of Virginia. 90 Va. 413.

Argued at Wytheville. Decided at Richmond.

Appeal from decree of circuit court of Wise county, rendered at its December term, 1892, in chancery cause wherein J. M. Hardin, the appellant, was complainant and the Alexandria Insurance Company was defendant. The object of the suit was to compel the company to issue to the complainant a policy of insurance on a certain stock of merchandise pursuant to a contract theretofore made by the company with him, and to pay the loss thereon, amounting to $750, with interest from October 26, 1891. The court below dismissed his bill, with costs against him, and he appealed. Opinion states the case.

Fauntleroy, J., delivered the opinion of the court.

The facts which appear by the record are as follows: In November, 1890, one G. W. Lovell, whose occupation was general insurance business at Big Stone Gap, Wise county, Virginia, went to see W. S. Reese, who told him that he wished an insurance upon his stock of liquors and bar fixtures, and asked the rate, and was told by Lovell that the rate was three per centum. Whereupon Reese instructed Lovell to write a policy for $1,000. Lovell went to his office, where he had the blank forms and instructions of the Alexandria Insurance Company, and filled in a policy, as instructed, for $750 insurance upon the stock of liquors, and for $250 insurance upon the bar fixtures, furniture, etc., and mailed it to the "Alexandria Insurance Company, Alexandria, Virginia." Lovell, in a few days, received from that company a policy covering the property with insurance of $750 on the stock of liquors and $250 on the bar fixtures, furniture, etc., in the two-story frame building, metal roof, on Wyandotte avenue, Big Stone Gap, Va., for one year from 12 M., November 25, 1890, to 12 M., November 25, 1891. This policy he delivered to the insured, W. S. Reese, and received from him the premium of $30 for the Alexandria Insurance Company. On the second day of December, 1890, Lovell endorsed on this policy a permit for Reese, the insured, to remove the stock of liquors to a storage house in rear of the original place, and mailed the said policy, thus endorsed, to the company for its approval. The company did approve the permit so endorsed by Lovell upon the said policy and returned it, with its approval, to Lovell, who delivered it to Reese. On the 7th of May, 1891, Reese assigned this policy to J. M. Hardin, the appellant, by a writing, witnessed by Lovell, who sent the said policy, so endorsed with the said assignment, to the Alexandria Insurance Company, who approved it and returned it to Lovell, who delivered it to said Hardin. Thus in May, 1891, the original policy

became the property of Hardin (the appellant), with the sanction of the company to the assignment and to the removal of the stock insured from the two-story frame house to the storage house in its rear. On or about 27th of July, 1891, Hardin removed the stock of liquors insured from the storage house to the "Intermont Hotel," and, through Lovell, obtained from the Alexandria Insurance Company its approval and permit to Hardin of this second removal. About the 31st of August, 1891, Hardin informed Lovell that he had removed the stock of liquors to the Summerfield House or building, and asked Lovell to give him a permit or approval of the said transfer. Lovell told Hardin that as there were so many endorsements on the policy, it would be better to cancel it and take out a new policy for the return premium. Hardin was in a great hurry, and told Lovell to do that. Lovell called Hardin back and told him to wait till he could fill in the receipt for the return premium, when Hardin said to Lovell: "Show me where to sign; you can fill in the amount." This Lovell did, and filled in $5, according to the *short-rate* table, though he wrote at the foot of the said receipt for the return premium, "cancelled *pro rata* and new policy to be issued." Lovell then sent this original policy, so endorsed, to the Alexandria Insurance Company, who kept or suppressed it; and, instead of issuing a duplicate of the original policy, as Hardin expected, issued a new and *different* policy according to the *short-rate* table (while the original policy was according to the *pro rata*) for $1,000 on stock, which device and arrangement shortened the life of the policy to the 9th of October, 1891, instead of the 25th of November, 1891, and made it expire on the 9th of October, 1891.

This new policy was sent by the Alexandria Insurance Company to Lovell, but it never came to the hands or to the sight of Hardin. Hardin was absent in Norfolk when it came to Lovell, and Lovell left it, he says, at the Summerfield House, which was not Hardin's place of abode and in which he had no concern except the liquor stored there.

Hardin contends and deposes that he had only $882 in stock, and had not asked for insurance of $1,000, nor for over $750. On the 26th day of October, 1891, the Summerfield House was burned down, and in it the stock of liquors was destroyed of the value of $882.

The Alexandria Insurance Company, on demand, refused to pay the insurance, and denied all liability on the ground that the new policy expired on the 9th of October, 1891, and that no policy existed on the 26th of October, 1891. Had the new policy (issued by the insurance company but never delivered to Hardin) been a duplicate of the original (as Hardin claimed and expected), at *pro rata* rates, as the original was, it would not have expired till after the 26th of October, 1891, the date of the fire, and it would have cov-

the first. It was wholly different from the policy which Lovell suggested to Hardie to obtain because of the numerous endorsements on the original the only reason assigned by Lovell and urged by Hardie for cancelling the original policy and taking out a new one. This advice and the reason was the only cause of Hardie's assenting to Lovell's suggestion and he reasonably understood and relied upon Lovell that the new policy was to be the same as the one surrendered for convenience only, because the original was covered at once by the proposed endorsements. The question now is, who is responsible for this change in policies—a change evidently not intended or expected by Hardie? The responsibility lies between the Alexandria Insurance Company and Lovell, to whom Hardie looked as the authorized agent or representative of the company. Either Lovell misinformed the company as to the terms of the new policy asked for by Hardie, and do not oppose the company's claim why Hardie asked for a new policy and not for an Lovell's suggestion and the reason for the suggestion or else the company deliberately ignored the understanding between Lovell and Hardie, and arbitrarily issued the new policy to suit itself. A shortsighted rule, instead of according to the memorandum endorsed upon the original policy by Lovell "Cancelled for rate and new policy to issue." The new policy as written was not contemplated, nor asked for, by Hardie. It was the device of the company or of Lovell. If it was the work of the company it is responsible for increasing Hardie's security by $5000 insurance upon the stock insured. If it was Lovell's act, and intended the company, whose medium he was duly held and responsible for his acts in the course of its business. Both Lovell and the company claim that the company had never issued a commission to him as alone agent, and that he was acting only as a broker. But this is playing upon words, but the whole testimony and the transaction itself show that he was held out to the public as the agent or intermediate of the company, by and for whom all transactions with the company to procure holding of insurance must pass subject to approval. The insurance company furnished him with all blank papers and blanks, required to his acts approved proofs of required proofs by him, and paid to him, thereby treating and holding him out as agent to the public. They had the right to deal with the company by and through him as such agent in fact. Otherwise the public would be misled and misguided by either, or by a combination of both.

The Alexandria Insurance Company must be held responsible for the loss sustained by Hardie by a change of his policy at the instance which was done by it, and not intended or contemplated by him, and brought about either by the agent, Lovell, or by the act of the company of its own motion or by a combination of the company and Lovell.

ered the loss. It was wholly different from the policy which Lovell suggested to Hardin to obtain, because of the numerous endorsements on the original, the only reason assigned by Lovell and urged upon Hardin for canceling the original policy and taking out a new one. This advice and this reason was the only cause of Hardin's agreement to Lovell's suggestion, and he reasonably understood and relied upon Lovell that the new policy was to be the same as the one surrendered, for convenience only, because the original was covered all over by oft-repeated endorsements. The question now is, who is responsible for this change of policies—a change certainly not intended or expected by Hardin? The responsibility lies between the Alexandria Insurance Company and Lovell, on whom Hardin relied as the authorized agent or representative of the company. Either Lovell misinformed the company as to the terms of the new policy asked for by Hardin, and did not apprise the company of the reason why Hardin asked for a new policy, and that, too, on Lovell's suggestion and the reason for the suggestion, or else the company deliberately ignored the understanding between Lovell and Hardin, and arbitrarily issued the new policy to suit itself, at short-table rates, instead of according to the memorandum endorsed upon the original policy by Lovell, "Canceled *pro rata*, and new policy to issue." The new policy, as written, was never contemplated, nor asked for, by Hardin. It was the device of the company or of Lovell. If it was the work of the company, it is responsible for destroying Hardin's security for $750 insurance upon the stock insured. If it was Lovell's act, and he misled the company, whose medium he was, it is liable and responsible for his acts in the conduct of its business. Both Lovell and the company claim that the company had never issued a commission to him as their agent, and that he was acting only as a broker. But this is playing upon words, and the whole testimony and the transaction itself show that he was held out to the public as the agent or intermediate of the company, by and through whom all transactions with the company by parties seeking or having insurance must pass, subject to approval. The insurance company furnished him with all needful papers and blanks, responded to his acts, approved permits of removal given by him, and paid his rent, thereby treating and holding him out as agent to the public, who had the right to deal with the company by and through him as their agent in fact. Otherwise the public would be misled and defrauded by either, or by a combination of both.

The Alexandria Insurance Company must be held responsible for the loss occasioned to Hardin by a change of his policy of insurance, which was made by it, and not intended or contemplated by him, and brought about, either by the agent, Lovell, or by the act of the company, of its own motion, or by a combination of the company and Lovell.

The decree appealed from is erroneous, and must be annulled and reversed, and this court, proceeding to render such decree as the circuit court of Wise county should have entered in the cause, will enter a decree for the appellant, according to the prayer of his bill, which the circuit court erred in dismissing.

Decree reversed.

CHAPTER V

AGENCY, CONSTRUCTION AND EXECUTION OF INSTRUMENTS.

Section I.—Special, General and Universal Agents.

LONDON SAVINGS FUND SOCIETY v. HAGERSTOWN SAVINGS BANK.

1866. Supreme Court of Pennsylvania. 50 Pa. St. 468.

Woodward, J.—The Hagerstown Savings Bank brought the action of assumpsit against William McGrath and his associates, co-defendants, as partners trading and using business under the name and style of the London Savings Fund Society. The first count in the plaintiff's favor, is found upon a "certain written obligation, commonly called a certificate of deposit, for the sum of five thousand dollars, signed by H. Easton, treasurer of said London Savings Fund Society (who had full power conferred upon him to do such act), and then and there delivered said certificate of deposit to said plaintiff, and thereby promised to pay said plaintiff said sum of five thousand dollars six months after the same thereof, with interest at six per cent." The second count is upon a certificate for a deposit of the same, made by H. Easton, and to him endorsed, but delivered by the defendants to the plaintiff. Then followed the common counts.

The copy of the certificate or deposit shows that it was issued on the first of January, 1857, by H. Easton, treasurer, to plaintiff, for five thousand dollars, payable to the order six months after date, with interest at six per cent., and to him endorsed in blank.

Besides all the general pleas, the defendants pleaded specially: 1. That the said writing obligatory was not their act or deed. 2. That Hezekiah Easton was not agent or authorized, as treasurer of the London Association or otherwise, to sign or endorse the said writing, and that he issued it fraudulently and corruptly, without the knowledge or authority of the defendants, of all which the plaintiff had full knowledge when the certificate came into their possession. 3. That Hezekiah Easton was not treasurer of the London Savings Fund Society when the said writing was made. 4. That the defendants did not make and cause the same to be delivered. 5. That Easton did not deposit the five thousand dollars mentioned in said certificate, but the same belonged to the Society. 6. That

The decree appealed from is erroneous and must be annulled and reversed, and this court proceeding to render such decree as the circuit court of Wise county should have entered in the cause, will enter a decree for the appellant, according to the prayer of his bill, which the circuit court should have done.

Decree reversed.

CHAPTER V.

EXTENT, CONSTRUCTION AND EXECUTION OF AUTHORITY.

Section 1.—Special, General and Universal Agents.

LOUDON SAVINGS FUND SOCIETY v. HAGERSTOWN SAVINGS BANK.

1860. Supreme Court of Pennsylvania. 36 Pa. St. 498.

Woodward, J.—The Hagerstown Savings Bank brought this action of assumpsit against William McGrath and his numerous co-defendants, as partners trading and doing business under the name and style of the Loudon Savings Fund Society. The first count in the plaintiff's *narr.* is found upon a "certain writing obligatory, commonly called a certificate of deposit, for the sum of five thousand dollars, signed by H. Easton, treasurer of said Loudon Savings Fund Society (who had full power conferred upon him to do such act), and then and there delivered said certificate of deposit to said plaintiff, and thereby promised to pay said plaintiff said sum of five thousand dollars, six months after the date thereof, with interest at six per cent." The second count is upon a certificate for a deposit of like sum, made by H. Easton, and by him endorsed, but delivered by the defendants to the plaintiff. Then followed the common money counts.

The copy of the certificate of deposit shows that it was issued on the first of January, 1857, by H. Easton, treasurer, to himself for five thousand dollars, payable to his order six months after date, with interest at six per cent., and by him endorsed in blank.

Besides all the general pleas, the defendants pleaded specially: 1. That the said writing obligatory was not their act or deed; 2. That Hezekiah Easton had no power or authority, as treasurer of the Loudon Association or otherwise, to sign or endorse the certificate, and that he issued it fraudulently and corruptly, without the knowledge or authority of the defendants, of all which the plaintiff had knowledge when the certificate came into their possession; 3. That Hezekiah Easton was not treasurer of the Loudon Savings Fund Society when the said writing was made; 4. That the defendants did not make said paper, nor deliver the same to the plaintiff; 5. That Easton did not deposit the five thousand dollars mentioned in said certificate, but was largely indebted to said society; 6. That

the plaintiff is not a *bona fide* holder of said certificate for value; 7. That the proceeds of said certificate did not go into the business of the defendants, but were appropriated by said Easton, and that the plaintiff knew such use of the funds was intended. By means of these numerous pleas, and the points submitted on the one side and the other, the case was presented in every possible aspect.

On the trial of the cause the learned judge directed the jury to return a verdict for the amount of the plaintiff's claim, and declined to submit any question of fact for their decision. To the admission of evidence, and the refusal of the court to give instructions prayed for, sixteen errors are assigned, which I do not propose to consider in consecutive order, though all that is material in them shall be noticed.

It is apparent that the great question raised upon the record had reference to the character and extent of Easton's authority as the agent of the defendants. The party who avails himself of the act of an agent must, in order to charge the principal, prove the authority under which the act is done. If the authority be created by power of attorney or other writing, the instrument itself must in general be produced; and since the construction of writings belongs to the court, and not to the jury, the fact and scope of the agency are, in such cases, questions of law, and are properly decided by the judge. But the authority may be by parol or it may be implied from the conduct of the employer in sanctioning the credit given to a person acting in his name. And in many cases the acts of an agent, though not in conformity to his authority, may yet be binding upon his employer, who is left, in such cases, to seek his remedy against his agent. Whether an employer be or be not bound by such acts as are not conformable to the commission given by him depends principally upon the authority being general or special. By a general agent is understood, not merely a person substituted in the place of another for transacting all manner of business, but a person whom a man puts in his place to transact all his business of a particular kind, as to buy and sell certain kinds of wares, to negotiate certain contracts, and the like. An authority of this kind empowers the agent to bind his employer by all acts within the scope of his employment, and that power cannot be limited by any private order or restriction not known to the party dealing with the agent. A special agent is one who is employed about one specific act, or certain specific acts only, and he does not bind his employer unless his authority be strictly pursued. Paley on Agency, 199 *et seq.* "A general authority," said Lord Ellenborough in Whitehead v. Tuckett, 15 East 408, "does not import an unqualified one, but that which is derived from a multitude of instances; whereas a particular authority is confined to an individual instance." And in all instances where the authority, whether general or special, is to be implied from the conduct of the principal, or where the medium of proof of agency is *per testes,* the

jury are to judge of the credibility of witnesses and of the inferences to be made from their testimony.

As the plaintiff here did not produce any written evidence of Daniel's agency, it was for them as the case is put in the [illegible] whether the alleged agency existed or not, and, if so, whether it was general or special. Whether the evidence introduced [illegible] was sufficient to establish the existence of the agency [illegible] and if so, whether the acting of the defendant in that matter was within the scope of his authority.

Farmers' Insurance Co. v. Wells, 6 Ohio St. 521; Jordan v. Stevens, 23 Vt. 511; Sibley v. Lewis, 30 Vt. 511; Williams v. Cheney, 31 Ill. 477; Ins. Co. v. Tyler, 7 Wall. 493.

The judgment is reversed and a venire de novo is awarded.

GILLICK AND HOLMES v. GROVER.
HOLMES v. GROVER.

ERROR TO COURT OF COMMON PLEAS OF NEW JERSEY.

Decided [illegible]

ERROR.—On the argument the objections were taken to the general principles of law stated by the supreme court as determining the liability of a principal for the acts of his agent. The bill of exceptions raises the question whether the judge was justified in expressing the [illegible] in accordance with that opinion, that upon the facts proved the plaintiffs were not entitled to recover, without leaving any question of fact to the jury. The notes were signed by the defendant's name by his wife without his knowledge or consent, and were issued by her, without his knowledge, to John P. Holmes, as a means of raising money for his benefit. The plaintiffs at both suits had knowledge that the notes were given for accommodation, and not given for the benefit of John P. Holmes. The case therefore is not [illegible] by those considerations which arise out of the fact that the holder of a negotiable note is a bona fide holder without notice of the purpose for which it was given. The question is purely one of the authority of the wife as [illegible] husband to sign these notes.

[illegible]

jury are to judge of the credibility of witnesses and of the implications to be made from their testimony.

As the plaintiff here did not produce any written evidence of Easton's agency, it was the duty of the court to inform the jury what constitutes agency, express or implied, special or general, and to refer to them the questions: 1. Whether the evidence satisfied them that Easton was either the general or special agent of the defendants; and 2. Whether the issuing of the certificate in suit was within the scope of his authority.

Peries v. Aycinena, 3 Watts & S. 79; Jordan v. Stewart, 23 Pa. St. 247; Sekle v. Irwin, 30 *id.* 573; Williams v. Getty, 31 id. 461 (72 Am. Dec. 757.)[1] * * *

The judgment is reversed and a *venire facias de novo* is awarded.[2]

GULICK AND HOLMES v. GROVER.
HOLMES v. GROVER.

1868. COURT OF ERRORS AND APPEALS OF NEW JERSEY.
33 N. J. L. 463.

DEPUE, J.—On the argument, no objections were taken to the general principles of law stated by the supreme court as determining the liability of a principal for the acts of his agent. The bill of exceptions raises the question whether the judge was justified in instructing the jury, in conformity with that opinion, that upon the facts proved the plaintiffs were not entitled to recover, without leaving any questions of fact to the jury. The notes were signed in the defendant's name, by his wife, without his knowledge or consent, and were loaned by her, without her husband's knowledge, to John R. Holmes, as a means of raising money for his benefit. The plaintiffs in both suits had knowledge that the notes were mere accommodation, or lent paper, for the benefit of John R. Holmes. The case, therefore, is not embarrassed by those considerations which arise out of the fact that the holder of a negotiable note is a *bona fide* holder without notice of the purpose for which it was made. The question is purely one of the authority of the wife to bind the husband by signing these notes.

[1] A portion of the opinion is omitted.

[2] See Wood v. McCain, page 11.

"Agents are said to be 'general' when their authority is defined by their character or business, as in the case of factors, brokers, or partners; or 'special' when their authority is limited by the terms of their appointment." Holland, Jurisprudence, (9th ed.) 260.

"Agents may be clothed either with general or special powers. First. A general agent may do everything which the principal may. Powers of this sort are not usually granted. Second. Of the second sort are agents limited as to the objects or the business to be done, and left at large as to the mode of transacting it." Pendleton, J., in Hooe v. Oxley, 1 Wash. (Va.) 19, 23.

The liability of the husband, on the argument, was put by the counsel on three grounds: 1. That the making of these notes, for the purpose for which they were used, was within the scope of her authority, as evidenced by the course of her usual employment; 2. That the defendant held his wife out to the plaintiffs as having competent authority to affix his name to notes for all purposes whatsoever; and 3. That the notes, though invalid against him when made, became valid obligations by a subsequent ratification.

It appears from the evidence that the wife was formerly in the wine business, which was conducted by her in her husband's name, and at the time of the making of the notes the defendant was in the drug business at New Brunswick, which was carried on in his son's name, but the defendant was the owner of the goods put in the business, and furnished the capital with which it was conducted. The wife was the manager of the business, and attended chiefly to the buying and selling. The moneys received were deposited by her in the banks, in his name, and were drawn out frequently on checks, signed by her in her husband's name, and she also signed his name to notes which were given for debts incurred in the course of the business. Some of these transactions in relation to the wine business were had with the firm who are the plaintiffs in one of these suits and extended down to about the time of the making of these notes, when their accounts were closed by a note signed by the wife in the name of the husband. This use of his name by his wife was known to him, and the notes so given were paid by him, or by her out of his funds.

It may be stated, as the result of the evidence, that in the usual business of the defendant, his wife was his general agent and was, with his knowledge and consent, accustomed to sign his name to notes and checks made in the course of such business. But it does not appear that the wife ever, except in the instances of these two notes, signed her husband's name to accommodation paper, or used it as security for other persons. From this general authority would result a liability of the husband for all notes made by her in his name in the course of his general business; but that liability would extend no further than to include such notes as were given in the usual course of business. I take the rule to be well settled that the authority to sign accommodation paper, or as security for a third person, must be specially given, unless the authority of the agent is one of universal agency, and will not flow from any general authority to transact business for the principal. The making of accommodation paper, or the loan of one's name as security for another does not fall within the ordinary business in which persons engage. The authority to use a principal's name for that purpose is not established by proof of an agency, however general, in the transaction of the principal's business, even though in connection with such business it be shown that the agent was authorized to make

notes in his name or for principal. To validate such paper it must be shown that the agent was authorized to make use of his principal's name for that purpose, and his authority must either be express or implied from proof that he was accustomed with the principal's consent to use his name for the accommodation of others. An agent who is authorized to draw and endorse notes and to draw, endorse and accept bills of exchange, can act under such authority only to the extent of his principal's business, and is not authorized to draw, endorse or accept them for the accommodation of mere strangers. Story on Agency, § 99; Bank of Pittsburgh v. Johnson, 1 Rich. 44; Osborne v. Moxley, 19 Miss. 781; Union River Bank v. Agnew, 3 Hill 202; Stoddard v. Kent, 12 Texas 281; Bradley v. State Bank, 3 Kerr. 107; Mc Ilaw v. Orange Bank, 2 Ala. 385.

The evidence relied on to fix the defendant's liability, consisted in his having sent his wife out as having an authority which would include the power to make these notes in his principal's name, in fact of Francis H. Holmes and James C. Gulick, the payee (it is one of these notes). Mr. Francis H. Holmes says: "I have known John Crover [agent] for years; dealt with him that time; I purchased goods from Crover first; I paid some money and some notes; nearly [all Crover received for him—] received it, 1858, paid for [the] dol to a business way, was right—he sanctioned it."

Mr. James C. Gulick says: "I have known defendant since May, 1858; he has dealt with me from that time to time since; we were private all and any Mr. Crover was engaged in [the business], the purchases he made of us were in the business; during that time Mrs. Crover acted in that business with the knowledge of her husband. the goods were paid for in notes and checks. Mrs. Crover did all the business—bought, paid and gave the notes. John Crover's name was signed to those notes, I was at John Crover's residence in August, 1859; I spoke to him about the note he and his wife were doing business with us. I asked him if the wife transacting and giving [the] note in his name, was all right; he said it was—it was the same as if he did it himself—whatever she did was right after that time we continued to do business in the same way; notes and checks were given signed John Crover's, it was all done by Mrs. Crover, to her husband's name from that time to the present. John Crover has never countermanded them, instructed."

The plaintiff's rely upon these several expressions as to the extent of the authority the defendant was contented on his part to declare from that she was empowered to use his name in her discretion and [illegible] for all purposes at her pleasure and that the [illegible] was known to them, was still continuing, and the notes were given and covered that particular transaction. From [illegible] these expressions as the evidence of an express authority, the question becomes one purely of construction.

notes in the name of his principal. To validate such paper it must be shown that the agent was authorized to make use of his principal's name for that purpose; and his authority must either be express or implied from proof that he was accustomed, with the principal's consent, to use his name for the accommodation of others. An agent who is authorized to draw and endorse notes, and to draw, endorse and accept bills of exchange, can act under such authority only to the extent of his principal's business, and is not authorized to draw, endorse or accept them for the accommodation of mere strangers. Story on Agency, § 69; Bank of Hamburgh v. Johnson, 1 Rich. 42; Odiorne v. Maxey, 13 Mass. 181; North River Bank v. Aymer, 3 Hill 262; Steinbach v. Read, 11 Gratt. 281; Kingsley v. State Bank, 3 Yerg. 107; Wallace v. Branch Bank, 1 Ala. 565.

The evidence relied on to fix the defendant's liability, because of his having held his wife out as having an authority which would include the power to make these notes in her husband's name, is that of Francis H. Holmes and James C. Gulick, the plaintiffs in one of these suits. Mr. Francis H. Holmes says: "I have known John Grover twenty-five years; dealt with him that time; I purchased goods from Grover first; I paid some money and some notes; Mary Ann Grover transacted his business; he said, in 1838, what his wife did in a business way was right—he sanctioned it."

Mr. James C. Gulick says: "I have known defendant since May, 1848; he has dealt with me from that time to time notes in suit were given, off and on; Mr. Grover was engaged in wine business; the purchases he made of us were in that business; during that time Mrs. Grover acted in that business with me, representing her husband; the goods were paid for in notes and checks. Mrs. Grover did all the business—bought, paid and gave the notes; John Grover's name was signed to those notes; I was at John Grover's residence in August, 1849; I spoke to him about the way his wife was doing business with us; I asked him if his wife, transacting and doing business in his name, was all right; he said it was—it was the same as if he did it himself—whatever she did was right; after that time, we continued to do business in the same way; notes and checks were given, signed John Grover; it was all done by Mrs. Grover, in her husband's name; from that time to the present, John Grover has never countermanded those instructions."

The plaintiffs rely upon these general expressions as to the extent of the authority the defendant had conferred on his wife as declarations that she was empowered to use his name in her discretion, without limitation, for all purposes, at her pleasure; and that that authority, not being revoked by notice to them, was still subsisting when the notes were given, and covered that particular transaction. Treating these expressions as the evidence of an express authority, the question becomes one merely of construction.

One of these conversations took place twenty-three years, and the other twelve years, before the making of these notes.

At the time of the conversation with Mr. Holmes he was in business at Cranberry, in this state, and his transactions with Grover were in purchasing goods of him. At the period referred to by Mr. Gulick, he and Mr. Holmes were together in the mercantile business in New York, and the dealings of the defendant with the firm were confined solely to the purchase by Mrs. Grover of goods to be used in the manufacture of wines, which was then carried on in the husband's name. These dealings continued down to September, 1858, and were always of the same character. The conversations in which these expressions were used were directly in connection with the business then being transacted by Mr. Grover with the parties, and had express reference to the manner in which Mrs. Grover was using her husband's name and credit in the business. Obviously, the language used must be construed with reference to the business then being transacted between the parties, and which was then the subject-matter of discussion. And any general expressions used by the defendant in relation to the extent of his wife's authority must be restricted to such business. A universal agency, such as this is claimed to have been, can only be created by clear and unequivocal language, and will not be inferred from any general expressions, however broad. Mr. Justice Story, in his work on Agency, says: "It may, perhaps, be well to add that general agents are to be carefully distinguished from universal agents; that is, from agents who may be appointed to do all the acts which the principal can personally do, and which he may lawfully delegate the power to another to do. Such a universal agency may potentially exist; but it must be of the very rarest occurrence. And indeed it is difficult to conceive of the existence of such an agent practically, inasmuch as it would be to make such an agent the complete master, not merely *dux fact,* but *dominus rerum*, the complete disposer of all the rights and property of the principal. It is very certain that the law will not, from any general expressions, however broad, infer the existence of any such unusual agency; but it will rather construe them as restrained to the principal business of the party in respect to which it is presumed his intention to delegate the authority was principally directed." Story on Agency, § 21. Language, however general in its form, when used in connection with a particular subject-matter, will be presumed to be used in subordination to that matter, and therefore is to be construed and limited accordingly. Story on Agency, §§ 62, 69; Rossiter v. Rossiter, 8 Wend. 494 (24 Am. Dec. 62); 1 Am. Lead. Cas., 4th ed., 566.

A letter of attorney authorizing one to issue notes in the name of the principal will be construed as extending only to notes issued in the business of the principal, or for his benefit. If the intent be that

the attorney may issue notes for his own benefit, or the benefit of a third person, the authority must expressly so declare. North River Bank v. Aymar, 3 Hill 262. A power of attorney to collect debts, to execute deeds for lands, to authorize a complete adjustment of all concerns of the constituent in a particular place, and to do all other acts which the constituent could do in person, does not authorize the giving of a note by the attorney in the name of the principal. Rossiter v. Rossiter, 8 Wend. 494 (24 Am. Dec. 62). A letter of attorney to ask, demand and receive of the E. I. Company all money that might become due the principal, on any account whatsoever, and to transact all business, will not authorize the attorney to endorse away a bill taken by him under this power. The words "all business" must be confined to all business necessary for the receipt of the money. Hay v. Goldschmidt, cited in Hogg v. Smith, 1 Taunt. 349; Attwood v. Munnings, 7 Barn. & C. 278; Chitty on Bills, 29.

Adopting these settled rules of construction, it is manifest that the expressions of the defendant as to his wife's unlimited power to act for him in his name must be referred to the general business he was then engaged in and in which he might subsequently engage. That the notes were taken in the belief that she had the authority to make them is immaterial. The material question is, what authority, in point of fact, did the husband confer on his wife by the language he used, construed according to the recognized rules of construction? The act done was one requiring a special authority, and a party dealing with an agent, and knowing the nature of the act, must see to it that the agent possesses the requisite authority to bind his principal.

The burden of proof lies on him.[1] * * *

When the facts are undisputed, the question whether an agent has the requisite authority to bind his principal is a question of law for the court, whether such authority is sought to be sustained by a previous authorization or by subsequent ratification. Under the admitted or uncontroverted facts in these cases the judge properly instructed the jury that the plaintiffs could not recover on these notes.

The judgment must be affirmed.[2]

[1] A portion of the opinion is omitted.

[2] "The distinction between a general and special agent is well settled; the acts of the former bind the principal whether in accordance to his instructions or not; those of the latter do not unless strictly within his authority." Savage, C. J., in Rossiter v. Rossiter, 8 Wend. (N. Y.) 494, 497.

Section 2.—Rules of Construction.

ATWOOD v. MUNNINGS.

1827. Court of King's Bench. 7 B. & C. 278.

Assumpsit by the plaintiffs, as indorsees, against the defendant, as accepter, of a bill of exchange for 1560*l.* Plea, the general issue. At the trial before Lord Tenterden, C. J., at the London sittings after Michaelmas term, 1823, a verdict was found for the plaintiffs, subject to the opinion of this court on the following case:

The plaintiffs were bankers, carrying on business in the city of London; the defendant was a merchant engaged in extensive mercantile business, and also, in joint speculations to a considerable amount, with Thomas Burleigh, Messrs. Bridges and Elmer, S. Howlett and W. Rothery. In the year 1815 the defendant went abroad on the partnership business and remained abroad till after the bill upon which this action was brought became due. By a power of attorney dated the 18th of May, 1816, the defendant granted power to W. Rothery, T. Burleigh and S. Munnings, his wife, jointly and severally for him, and in his name, and to his use, to sue for and get in moneys and goods, to take proceedings and bring actions, to enforce payment of moneys due, to defend actions, settle accounts, submit disputes to arbitration, sign receipts for money, accept compositions, "indorse, negotiate and discount or acquit and discharge the bills of exchange, promissory notes or other negotiable securities which were or should be payable to him, and should need and require his endorsement;" to sell his ships, execute bills of sale, hire on freight, effect insurances, "buy, sell, barter, exchange, export and import all goods, wares and merchandises, and to trade in and deal in the same in such manner as should be deemed most for his interest; and generally for him and in his name, place, and stead, and as his act and deed, or otherwise, but to his use, to make, do, execute, transact, perform and accomplish all and singular such further and other acts, deeds, matters and things as should be requisite, expedient and advisable to be done in and about the premises, and all other his affairs and concerns, and as he might or could do if personally acting therein." By another power of attorney, dated the 23d of July, 1817, and executed by the defendant when abroad, he gave to his wife, S. Munnings, power to do a variety of acts affecting his real and personal property; "and also for him, and on his behalf, to pay and accept such bill or bills of exchange as should be drawn or charged on him by his agents or correspondents, as occasion shall require, etc.; and generally to do, negotiate and transact the affairs and business of him, defendant, during his absence, as fully and effectually as if he were present and acting therein." T. Burleigh corresponded with the defendant and acted as his agent, both before and after the receipt of this power.

Section 2.—Rules of Construction.

The defendant, while abroad, employed part of the produce of the joint speculations in his individual concerns, and during his absence T. Burleigh, for the purpose of raising money to pay to the creditors of the joint concern, who were becoming urgent, drew four bills of exchange for 500*l* each upon the defendant, dated May 22, 1819. The proceeds of those bills were applied in payment of partnership debts; they were accepted by the defendant by procuration of S. M., his wife. The bill in question was afterward, in order to raise money to take up those bills, drawn and accepted in the following form: "Six months after date pay to my order 1560*l*, for value received: T. Burleigh. Accepted *per* procuration of G. G. H. Munnings—S. Munnings." This bill was discounted by the plaintiffs. The defendant returned to England in October, 1821, and he, and each of the partners to the joint speculations, claimed to be a creditor on that concern.

Parke for the plaintiffs. The question is, whether, under either of the powers of attorney, the defendant's wife was authorized to accept bills drawn by Thomas Burleigh, to raise money to discharge debts owing by the partners in the joint concern? By the second power express authority was given to Mrs. M. to accept bills drawn by agents of the defendant as occasion might require. Burleigh, the drawer, is found to have acted as agent of the defendant, and, therefore, the only circumstance necessary to complete the authority is to show that occasion did require that the bill should be drawn. That, however, cannot affect third persons. They are bound to see the power to accept, but not to ascertain how far the bill was necessary. Powers are often construed differently as to the attorney and third persons. In Howard v. Baillie (a), Eyre, C. J., puts an instance, viz.: a power to pay debts in course of administration; payment of a simple contract before a specialty debt would be good, quoad the creditor, but not as to the attorney. It is not possible for strangers to have such a knowledge of the party's affairs as to be enabled to judge whether the occasion did make the bill requisite. The agent, of course, has such knowledge, and the power as to this part must be considered as directory only. The party is protected by having the choice of his own agent, and may derive great benefit from giving him power to draw or accept bills in cases of expediency as well as in cases of absolute necessity. The power in question may fairly be read as if the words "at the discretion of my attorney," or, "as my attorney shall think fit," had been inserted instead of "as occasion shall require." If the words had been "as shall be necessary," a different construction might have prevailed. The case of The East India Company v. Hensley (b), differs from the present. There the agent had a special and limited power to buy silk of a particular quality. If the order to him had been general, to purchase such silk as occasion should require, and he had bought silk of a second quality, although the occasion required him to buy it of the

first, the principal would have been bound by his act. But, secondly, the occasion did require this bill to be accepted. The case states that the defendant was engaged in various speculations individually and in partnership. He had applied to his own use funds of the joint firm. The joint concern was in debt, and the bill in question was drawn and accepted for the purpose of paying those debts. [Bayley, J. There is nothing said in the power as to partnership concerns, and as to them it was unnecessary, for the other partners had, without any power of this sort, authority to bind the defendant.] The words of the power are general; there is nothing in them to limit the authority to the private concerns of the defendant, and the words must be construed most strongly against him. But if it be held that the special authority to accept bills did not extend to this case, still the general power in the first instrument was sufficient to authorize the acceptance; that relates to the management of all the defendant's affairs, and if any words are sufficiently comprehensive to give both special and general powers, they have been used in that instrument.

Pollock, *contra*. If the first power had been capable of receiving the construction now attempted to be put upon it, the second would have been wholly unnecessary, but it manifestly was not intended to apply to the acceptance of bills. The question, therefore, turns upon the authority to accept given by the second power. Much argument has been addressed to the question how far the power was restricted by the introduction of the words "as occasion shall require." But, supposing no such words to have been used, then the power would have been to accept bills drawn by his agent or correspondent, but that must mean an agent or correspondent in that transaction. Nor would any difficulty arise out of such a construction, for the acceptance being by procuration ought to put parties taking the bill on their guard, and they should require the production of the letter of advice accompanying the bill.

Bayley, J.—This was an action upon an acceptance importing to be by procuration, and, therefore, any person taking the bill would know that he had not the security of the acceptor's signature, but of the party professing to act in pursuance of an authority from him. A person taking such a bill ought to exercise due caution, for he must take it upon the credit of the party who assumes the authority to accept, and it would be only reasonable prudence to require the production of that authority. The plaintiff in this case relies on the authority given by two powers of attorney, which are instruments to be construed strictly. By the first of the powers in question the defendant gave to certain persons authority to do certain acts for him and in his name and to his use. It is rather a power to take than to bind, and, looking at the whole of the instrument, although general words are used, it only authorizes acts to be done for the defendant singly; it contains no express power to accept bills, nor does there appear to have been an intention to give it; the first power, therefore, did not

warrant this acceptance. The second power gave an express authority to accept bills for the defendant and on his behalf. No such power was requisite as to partnership transactions, for the other partners might bind the firm by their acceptance. The words, therefore, must be confined to that which is their obvious meaning, viz.: an authority to accept in those cases where it was right for him to accept in his individual capacity. Besides, the bills to be accepted are those drawn by the defendant's agents or correspondents; but the drawer of the bill in question was not his agent *quoad hoc*. The bills are to be accepted, too, "as occasion shall require." It would be dangerous to hold that the plaintiff in this case was not bound to inquire into the propriety of accepting. He might easily have done so by calling for the letter of advice, and I think he was bound to do so. For these reasons, I am of opinion that judgment of nonsuit must be entered.

HOLROYD, J.—I agree in thinking that the powers in question did not authorize this acceptance. The word procuration gave due notice to the plaintiffs, and they were bound to ascertain, before they took the bill, that the acceptance was agreeable to the authority given. The case does not state sufficient to show that this bill was drawn by an agent in that capacity, but rather to the contrary; for it appears that it was drawn to raise money for the joint concern in which the drawer was a partner; it does not, therefore, come within the special power. Then, as to the general powers, these instruments do not give general powers, speaking at large, but only where they are necessary to carry the purposes of the special powers into effect.

LITTLEDALE, J.—I am of the same opinion. It is said that third persons are not bound to inquire into the making of a bill, but that is not so where the acceptance appears to be by procuration. The question then turns upon the authority given. The first power of attorney contains an authority to endorse, but not to accept bills; the latter, therefore, seems to have been purposely omitted. Neither is this varied by the general words, for they cannot apply to anything as to which limited powers are given. The second power gives authority "to accept for me and in my name bills drawn or charged on me by my agents or correspondents, as occasion shall require." The latter words, as to the occasion, do not appear to me to vary the question, and reading the sentence without them, it authorizes the acceptance of bills drawn by an agent. The present bill was not drawn by Burleigh in his character of agent, and, therefore, the acceptance was without sufficient authority, and the plaintiff cannot recover upon it.

Postea to the defendant.[1]

[1] See discussion of this case in North River Bank v. Aymar, 3 Hill (N. Y.) 262.

"The words 'per procuration' are an express statement that the party accepting the bill has only a special and limited authority, and therefore a person who takes a bill so accepted is bound at his peril to inquire into the extent

GOULDY v. METCALF et al.

1889. Supreme Court of Texas. 75 Tex. 455.

Acker, Presiding Judge.—W. H. Turner, by properly executed power of attorney, granted to H. E. Turner and A. P. Bell authority and powers as follows: "In and about my business, to buy, sell or exchange property; to receive and receipt for money; to sell and dispose of property, to give bills of sale thereto, or to sell and transfer real estate and execute deeds thereto; or to do and perform any lawful act in or about or concerning my business, as fully and completely as if I were personally present; and I herein and hereby confirm all their lawful acts and deeds that they perform in any manner connected with my business."

Under this instrument the attorneys in fact executed a statutory deed of assignment of Turner's property for the benefit of his creditors. Appellant Gouldy was named as assignee, and he took possession of the assigned estate as such.

Appellees Ruder and Pool were creditors of Turner, and sued out an attachment against him, under which appellee Metcalf, as sheriff, took from the possession of Gouldy the stock of merchandise, books and accounts, etc., which he had received as assignee of Turner.

Gouldy brought this suit as assignee against the sheriff and plaintiffs in attachment to recover damages for the wrongful seizure and conversion of the property.

On the trial plaintiff, having introduced in evidence the power of attorney, offered the deed of assignment, which was objected to by defendants upon the ground that "the power of attorney did not authorize the attorneys in fact to make the deed." The objection was sustained, and there was no other evidence offered.

The court, trying the case without a jury, rendered judgment for defendants.

The only question presented is, Did the trial court err in holding that the power of attorney did not authorize the attorneys in fact to execute the deed of assignment? That a deed of assignment for the benefit of creditors may be executed by an agent or attorney in fact, specially authorized thereto, we think has been settled by the decision in McKee v. Coffin, 66 Tex. 307, 308, where it is said: "It is now urged that the court below erred in admitting in evidence the deed of assignment, because there is no sufficient evidence that it was ever executed by S. W. Kniffin. The evidence shows that he was not

and nature of the agent's authority." Byles, J., in Stagg v. Elliott, 12 C. B. N. S. 373, 381.

"A signature by 'procuration' operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority." Negotiable Instruments Law, § 21.

GOULDY v. [illegible]

[illegible] Term, 75 Ves. 429

[illegible] Lord Eldon, [illegible] Turner by properly executed power of attorney, [illegible] C. Turner and A. [illegible] full authority and power to follow [illegible] and about my business to buy, sell or exchange property, [illegible] and account for money, to sell and dispose of property [illegible] thereof, or to sell and transfer real estate and [illegible] or to do and perform any lawful act in or about [illegible] as fully and completely as if I were personally present, and I hereby confirm all that said [illegible] may perform in my name connected with my business.

Under the [illegible] the attorney at first executed a statutory deed of assignment of property for the benefit of his creditors. Subsequently [illegible] was found to be insolvent and he took possession of the property.

Appellees, [illegible] creditors of Turner and took out an execution [illegible] under which appellee Sherrill, as sheriff, took possession of Gouldy's stock of merchandise, books and accounts which he had received as assignee of Turner.

Gouldy brought an action of replevin against the sheriff and plaintiffs [illegible] damages for the wrongful seizure and conversion of the property.

On the trial plaintiffs introduced in evidence the power of attorney and [illegible] assignment, which was objected to by defendants upon the ground that the power of attorney did not authorize the attorney to make or execute the deed. The objection was sustained, and [illegible] exception was taken.

The court, [illegible] a jury, rendered judgment for defendants.

[illegible] the trial court erred in holding that the power of attorney did not authorize the attorney in fact to execute the deed of assignment. [illegible] deed of assignment for the benefit of [illegible] creditors [illegible] an agent or attorney in fact, specially authorized [illegible] has been settled by the decision in Wickes v. Caine, [illegible] 12 C. B. [illegible] is now urged that the court below [illegible] in excluding in evidence the deed of assignment because there [illegible] evidence that it was ever executed by C. W. Turner. The evidence shows that he was not [illegible] at the time [illegible] to Gouldy. Elliott, 12 C. B. N. S. [illegible]

[illegible] a power to [illegible] that the agent has but a limited authority [illegible] and the [illegible] duty to give the agent in so doing actual notice [illegible] Negotiable Instruments Law, § [illegible]

present when the deed was executed, but that prior to its execution he had directed this to be done by those who did execute it, upon the happening of a then contemplated contingency."

And again: "What a person under no disability may do in person, he may ordinarily do through an agent; but it is claimed that this is not true under the act regulating assignments; that the deed of assignment must be the personal act of the owner of the property assigned, and, as an evidence of this, it is urged that the assignor must make oath to the schedule.

"It is true that the second section of the act does require that the inventory and schedule shall be verified by the oath of the debtor, but this is not essential to the validity of the assignment, for the tenth section declares that 'no assignment shall be declared fraudulent or void for want of any inventory or list, as provided herein, but if such list and inventory be not annexed and verified as provided in this act, it shall be *prima facie* evidence that the assignor has secreted and concealed some portion of the property belonging to his estate from his assignee, unless,' etc. It is said that 'the processes provided against the assignor, and the penalties denounced against him, are all personal, and cannot be transferred to and performed by or enforced against an agent.' If an agent makes a false oath in the course of the business of his principal, he may be indicted and convicted for false swearing or perjury, as the case may be, as though the false oath were taken in his own business."

We think it clear from the foregoing quotations that an assignment for the benefit of creditors may be made by any agent or attorney in fact authorized thereto. The instrument under which the power was exercised in this case does not in terms grant the authority. The language used in the grant of general power is certainly very comprehensive, but the established rule of construction limits the authority derived by the general grant of power to the acts authorized by the language employed in granting the special powers.

"When an authority is conferred upon an agent by a formal instrument, as by a power of attorney, there are two rules of construction to be carefully attended to:

"1. The meaning of general words in the instrument will be restricted by the context and construed accordingly."

"2. The authority will be construed strictly, so as to exclude the exercise of any power which is not warranted, either by the actual terms used or as a necessary means of executing the authority with effect." Ewell's Evans on Agency, 204, 205; Reese v. Medlock, 27 Tex. 123, 124, 84 Am. Dec. 611.

Applying these rules to this case, and none of the circumstances under which the power was executed being shown, we are of opinion that the attorneys in fact did not have the power to make the assignment, and that the court did not err in so holding.

We are, therefore, of opinion that the judgment of the court below should be affirmed.

Affirmed.[1]

GILBERT v. HOW.

1890. Supreme Court of Minnesota. 45 Minn. 121.

Ejectment for land in Scott county, brought in the district court for that county, and tried before Francis Cadwell, Esq., as referee, who ordered judgment for defendant, which was entered and from which the plaintiff appeals. The facts found were as follows: In 1856 Franklin Chase, being owner in fee, conveyed to Mary A. Clarke. On January 22, 1857, the latter mortgaged to Edward A. Judson. On February 28, 1857, Mary A. Clarke and Benjamin F. Bucklin made to Franklin Chase the power of attorney considered in the opinion, Bucklin having no interest in the land. On July 14, 1858, Chase, assuming to act under his power of attorney, executed and delivered, in the names of both principals, a conveyance to George A. Bucklin. In 1859 Judson brought suit in the United States circuit court for Minnesota to foreclose his mortgage, making George A. Bucklin the sole defendant, which suit proceeded to decree and sale, at which Judson became the purchaser, and, after confirmation, received the proper master's deed. In 1867 Judson conveyed to one Latz, who, in 1888, conveyed to plaintiff. The defendant offered no evidence.

Collins, J.—The deed in which Mary A. Clarke and B. F. Bucklin

[1] Compare Philadelphia Trust Co. v. Nat. Bank, 6 Fed. 114.

"When parties have reduced their contract to writing, courts will construe it according to the intention therein expressed, when that intention is clear upon its face. Only in cases of ambiguity in the terms of the written contract will courts resort to extraneous evidence to determine the intention of the parties." Grant, J., in Baker v. Baird, 79 Mich. 255, 259.

"This was a formal power of attorney, apparently deliberately executed, attested, and recorded. It will therefore be strictly construed, in view of the controlling purpose; and the addition of general words will not be construed to extend the authority, so as to add new and distinct powers different from those expressly delegated." Lumpkin, J., in White v. Young, 122 Ga. 830.

"The ordinary common-law rule is that all written powers, such as letters of attorney, or letters of instructions, must receive a strict interpretation; the authority never being extended beyond that which is given in terms, or is absolutely necessary for carrying the authority so given into effect." McAllister, J., in Bissell v. Terry, 69 Ill. 184, 191.

"Such an instrument (a power of attorney) is generally to be construed as a plain man, acquainted with the object in view, and attending reasonably to the language used, has in fact construed it. He is not bound to take the opinion of a lawyer concerning the meaning of a word not technical, and apparently employed in a popular sense." Curtis, J., in Very v. Levy, 13 How. (U. S.) 345, 358.

We are, therefore, of opinion [illegible] of the court below should be affirmed.

Affirmed.

were named as grantors, and George A. Bucklin as grantee, was executed by Bucklin in person, and by Franklin Chase in behalf and as the attorney in fact of Mary A. Clarke. The land described therein was then the sole property of the grantor last mentioned, so far as was shown by the record, Bucklin having no interest in it. The power of attorney, by virtue of which Chase assumed to act, was a joint power, executed and delivered to him by Mary A. Clarke and B. F. Bucklin. By its terms, the latter constituted and appointed Chase "our true and lawful attorney for us, and in our names," to enter upon and take possession of all lands "to which we are or may be in any way entitled or interested, and to grant, bargain, and sell the same, * * * and for us and in our names to make * * * and deliver good and sufficient deeds; * * * and we do hereby further constitute the said Chase our attorney, and in our names to transact and manage all business; * * * and also in our names to demand, sue for, recover and receive all sums of money," etc.

All powers of attorney receive a strict interpretation, and the authority is never extended by intendment or construction beyond that which is given in terms, or is absolutely necessary for carrying the authority into effect, and that authority must be strictly pursued. Rossiter v. Rossiter, 8 Wend. 294, 24 Am. Dec. 62; Brantley v. Southern Life Ins. Co., 53 Ala. 554; Bliss v. Clark, 16 Gray 60. This rule was applied in Rice v. Tavernier, 8 Minn. 214 (248), 83 Am. Dec. 778; Greve v. Coffin, 14 Minn. 263 (345), 100 Am. Dec. 229; Berkey v. Judd, 22 Minn. 287. And a party dealing with an agent is chargeable with notice of the contents of the power under which he acts, and must interpret it at his own peril. Sandford v. Handy, 23 Wend. 260; Nixon v. Hyserott, 5 Johns. 58.

The power under which Chase pretended to convey a tract of land, the sole property of Mary A. Clarke, must be construed as authorizing him to convey such lands only as were held and owned by his two constituents jointly or in common, and not the lands held and owned by either and separately. By its terms, the attorney was not empowered to convey land held and owned as the undivided property of one, and in which the other had no interest, nor was he given authority to transact any business, except that in which the parties were jointly concerned. The authority was special, and the written power joint in form. No mention was made of the separate property or business of either of the parties who executed it, and it cannot be inferred that they intended to confer upon Chase the power to convey such property or to transact such business. Dodge v. Hopkins, 14 Wis. 630; Johnston v. Wright, 6 Cal. 373. This rule is also recognized in Holladay v. Daily, 19 Wall. 606, although the point was not directly in issue. The deed referred to was a nullity, did not convey the land to George A. Bucklin, and when the mortgage given by Mary A. Clarke was foreclosed by action brought against Bucklin alone, the proper party, the owner of the land, was not made a defendant. The

foreclosure sale was void, and a purchaser thereat acquired no interest in the land sold. As the plaintiff's rights were predicated upon this sale, he failed to establish title to the land in himself, upon the trial.

Judgment affirmed.[1]

CRAIGHEAD ET AL., EXECUTORS v. PETERSON.

1878. COURT OF APPEALS OF NEW YORK. 72 N. Y. 279.

THIS action was brought upon two promissory notes alleged to have been executed by defendant, which were made payable to the order of Samuel N. Pike, plaintiff's testator, at the Park National Bank. The notes were dated July 12, 1872. They were in fact executed by one Abiel R. Packard, a son-in-law of defendant, in the name of the latter, Packard claiming to act under the following power of attorney:

"Know all men by these presents, that I, Robert Peterson, of the city, county and state of New York, have made, constituted and appointed, and by these presents do make, constitute and appoint, Abiel R. Packard, of said city, my true and lawful attorney, for me and in my name, place and stead to draw and endorse any check or checks, promissory note or notes, on any bank in the city of New York in which I may have an account, and especially in the Irving National Bank, of said city, and do any and all matters and things connected with my account in said Irving National or any other bank in said city, which I myself might or could do, in relation to my deposit account with said Irving National, or any other bank, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

"In witness whereof, I have hereunto set my hand and seal the eighth day of October, in the year one thousand eight hundred and sixty-nine. ROBERT PETERSON. (L. S.)

"Sealed and delivered in the presence of

"The words 'promissory note or notes' first interlined.

"JNO. S. PATTERSON."

[1] In Veatch v. Gilmer, 111 S. W. 746, the following power of attorney was executed: "I do hereby appoint Samuel H. Veatch my true and lawful attorney; and I do hereby empower him to do any lawful act in my name as if I were present." The court decided that the power of attorney was sufficient to authorize the conveyance of the principal's land.

Greenleaf had no account at the Park National Bank. The court stated on the trial that the power of the attorney conferred no authority upon Mr. Packard to execute the mortgage in which plaintiff's counsel chiefly excepted.

SECTION 3.—The plaintiff's relation, taking the notes in suit, made by an agent professing to represent the defendant as his principal, is presumed to have known the terms of the agency under which the agent assumed to act. He was bound to ascertain and know what were and existed of the agency, and the words of the instrument in which it was created, before he can credit to the agent. If the broker dealt with the agent without learning the extent of the powers delegated to him, he did so at his peril, and must abide by the consequences of the agent acted without or in excess of his authority. Story on Agency, § 72. If there was no ambiguity in the language of the power of attorney, there is no reason why in the case there should be a forced or unnatural interpretation of the instrument to save the broker or his representative from loss. The transaction was in the city of New York, where as well the supposed principal as Mr. Pike, the plaintiff's relation, and the professed agent resided, and if the power of attorney was ambiguous in its expression, or of doubtful interpretation, the defendant was bound to make the same in person or assent to and ratify the act of the agent. There may be cases in which from necessity a party dealing with an agent must anticipate his own interpretation of the authority, and take the risk of an doubtful or ambiguous phraseology. But not so here. The record is barren of evidence of fraud, design or misunderstanding of the notes. The power conferred upon the agent was limited, and by the power of attorney as it was drawn, Packard, the agent, was only authorized to draw and make checks or any bank in which the company had an account, "and to do and use all matters and things connected with his (the company's) said banking, which the principal might or could do." The last and general words only gave general powers to carry into effect the special purposes for which the power was given. Attwood v. Munnings, 7 B. & C. 278; Story v. Hall, 2 Denio, 486 & 1 id. 20; Bassett v. Bassett, 2 id. and post Story on Agency, § 99. The primary and special purpose of the power of attorney was to authorize Packard to draw checks in the business of the municipal corporation and against the accounts in bank, and to endorse checks payable to the order of the said accounts. The insertion of the words "promissory note or notes," by an interlineation after "check or checks," and before "or any bank," etc., must be read with the limited and special purpose of the power in full in view, and act as intending to give a more extended or general power. The making and endorsing of promissory notes, either for business or payable at the principal's bank, were entirely foreign of the authority given to draw and endorse checks and must deal with and is confined to the mere mechanism of the negotiation. The

Judgment affirmed.

CHARLOTTE [illegible] v. [illegible] PEARSON.

(1878, 1 Daly [illegible] New York, 74 N. Y. 279.

[illegible] presents that I, Moses Pearson of the [illegible] New York, [illegible] constituted and appointed [illegible] do make, constitute and appoint, Abiel [illegible] my true and lawful attorney, for me and in [illegible] to [illegible] and receive any check or checks [illegible] on any bank in the city of New York in which I [illegible] account, and especially in the Irving National Bank [illegible] and to sign, and all papers and [illegible] connected with [illegible] Irving National or any other bank in said [illegible] which I [illegible] or could do, if personally present, with [illegible] to my deposit account [illegible] National, or any other bank giving and granting unto my said [illegible] full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done in the premises, as fully, to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

In witness whereof, I have hereunto set my hand and seal the [illegible] October, in the year one thousand eight hundred and [illegible]

Moses Pearson. (L. S.)

Signed, sealed and delivered in the presence of

[illegible]

[illegible]

In Vesey [illegible], 10 S. W. 728, the following power of attorney was [illegible]: "I, Vesey Second, of [illegible] do hereby [illegible] and [illegible] my true and lawful attorney, [illegible] do and execute for me and in my name as if I were present [illegible] and hereby ratify and confirm all that my said attorney shall lawfully do [illegible]."

Defendant had no account at the Park National Bank. The court ruled on the trial that the power of the attorney conferred no authority upon Mr. Packard to execute the notes—to which plaintiff's counsel duly excepted.

ALLEN, J.—The plaintiff's testator, taking the notes in suit, made by an agent professing to represent the defendant as his principal, is presumed to have known the terms of the power under which the agent assumed to act. He was bound to ascertain and know the character and extent of the agency, and the words of the instrument by which it was created, before giving credit to the agent. If the testator dealt with the agent without learning the extent of the powers delegated to him, he did so at his peril, and must abide by the consequences, if the agent acted without or in excess of his authority. Story on Agency, § 72. If there was an ambiguity in the language of the power of attorney, there is no reason why in this case there should be a forced or unnatural interpretation of the instrument to save the testator or his representatives from loss. The transaction was in the city of New York, where as well the supposed principal, as Mr. Pike, the plaintiff's testator, and the professed agent resided, and if the power of attorney was ambiguous in its expression, or of doubtful interpretation, the defendant was accessible, either to make the notes in person or assent to and ratify the act of the agent. There may be cases in which from necessity a party dealing with an agent must act upon his own interpretation of the authority, and take the risk of any doubtful or ambiguous phraseology. But not so here. The record is barren of evidence as to the origin or consideration of the notes. The powers conferred upon the agent were limited, and by the power of attorney as first drawn, Packard, the agent, was only authorized to draw and endorse checks on any bank in which the testator had an account, "and to do any and all matters and things connected with his (my) account in" such banks, which the principal might or could do. The last and general words only gave general powers to carry into effect the special purposes for which the power was given. Attwood v. Munnings, 7 B. & C. 278; Perry v. Holl, 2 DeG., F. & J. 38; Rossiter v. Rossiter, 8 Wend. 494; Story on Agency, § 62. The primary and special purpose of the power of attorney was to authorize Packard to draw checks in the business of the principal upon and against his accounts in bank, and to endorse checks probably for deposit to the credit of the same accounts. The insertion of the words "promissory note or notes," by an interlineation after "check or checks," and before "on any bank," etc., must be read with the limited and special purpose of the power as first prepared in view, and not as intending to give a more extended or general power. The making and endorsing of promissory notes, either for discount or payable at the principal's bank, was a natural adjunct of the authority given to draw and endorse checks, and thus deal with and in respect of the bank accounts of the testator. The

dealings and business relations of the testator with the banks with whom he dealt, and his accounts with such banks, was the subject of the agency, and the instrument creating the agency restricted the powers of the agent to the making and endorsing of commercial instruments having an immediate connection with the banks with which the principal had dealings, and which would properly enter into his accounts with them.

The act of making the notes in suit was *ultra vires,* and the defendant is not liable thereon. A formal instrument delegating powers is ordinarily subjected to strict interpretation, and the authority is not extended beyond that which is given in terms, or which is necessary to carry into effect that which is expressly given. They are not subject to that liberal interpretation which is given to less formal instruments, as letters of instruction, etc., in commercial transactions which are interpreted most strongly against the writer, especially when they are susceptible of two interpretations, and the agent has acted in good faith upon one of such interpretations. Wood v. Goodridge, 6 Cush. 117; Attwood v. Munnings, *supra;* Hubbard v. Elmer, 7 Wend. 446; Hodge v. Combs, 1 Black. 192.[1] * * *

There was no error upon the trial, and the judgment must be affirmed.[2]

Section 3.—Execution of Authority.

(a) SEALED INSTRUMENTS.

BRADSTREET ET AL. v. BAKER ET AL.

1884. SUPREME COURT OF RHODE ISLAND. 14 R. I. 546.

COVENANT. On demurrer to the pleas. July 12, 1884.

DURFEE, C. J.—This is an action of covenant broken. The covenant, if valid, is a covenant by which the defendants bound themselves to receive from the plaintiffs, dealers in ice, and co-partners under the firm of the Centennial Ice Company, at Pittston, Maine, between June 1, 1878, and October 1, 1878, five thousand tons of ice, and to pay them for it at the rate of one and one-half dollars per ton, and to pay in full in cash at said rate for all the ice remaining unshipped October 1, 1878, the ice so remaining to be the property of the plaintiffs. The defendants made default by not receiving, though the plaintiffs were ready to deliver, the ice ac-

[1] A portion of the opinion regarding ratification is omitted.

[2] "An agreement 'to conserve the best interests of the agency' adds little, if anything, to an agreement to act as agent." Morton, J., in Butterick Pub. Co. v. Boynton, 191 Mass. 175, 179.

according to the contract. The plaintiffs sue for damages, claiming the stipulated price of the five thousand tons as liquidated damages. The defence is, first, that the defendants are not bound because the plaintiffs were not bound by the contract, the obligation [illegible] being [illegible]; and, second, that the plaintiffs can recover only their actual damages, the stipulated damages being [illegible] designed as a penalty.

The first question is, Did the plaintiffs bind themselves by the covenant? The contract was not executed by the plaintiffs personally, but it was [illegible] for them and signed by their agent, J. S. Brainerd, who had a sufficient power of attorney under seal. The contract begins thus: "Agreement made this eleventh day of February, 1868, between the [illegible] Ice Company of [illegible], Maine, party of the first part by J. S. Brainerd, agent, and Joseph H. Baker, [illegible], and E. C. Baker of Providence, R. I., parties of the second part, witnesseth." The agreement contained in the body of the instrument purports to be [illegible] between "the said party of the first part" and "the said parties of the second part," no names being given. It concluded as follows, to wit:

"In witness whereof, the parties have hereunto affixed their hands and seals the year and day first above written.

(Signed) "J. S. Brainerd, Agent. [L. S.]
"J. H. Baker [L. S.]
"E. C. Baker [L. S.]"

The defendants contend that the execution was ineffectual because the instrument does not contain the signature of the party of the first part by such agent, but only the signature of the agent himself. Undoubtedly, in the execution of a deed by an agent, the most approved form is for the agent to sign the name of his principal, writing his own name below, with the word "agent" following, and the preposition "by" preceding it. See City of Providence v. Miller, 11 R. I. 272, 275, and cases there cited. But the form is not material provided it appears on the face of the instrument that the deed was executed by the principal acting through his agent and not by the agent himself. In Wilks v. Back, 2 East, 142, an arbitration bond was given by Mathias Wilks for himself and under a power for his copartner James Byrne. The signatures were affixed as follows, to wit: "Mathias Wilks [L. S.]." "For James Byrne, Mathias Wilks [L. S.]." The Court of King's Bench decided that the execution was good. "Here the bond was executed," said the court, "by Wilks for and in the name of his principal, and this is distinctly shown by the manner of making the signatures. Not even this was necessary to be shown; for if Wilks had sealed and delivered it in the name of Byrne, that would have been enough, without stating that he had so done." The case was followed, with approval, in Mussey v. Scott, 7 Cush. 215, where the form of the signature was "B for A." [illegible] followed by the Supreme Court of [illegible]

cording to the contract. The plaintiffs sue for damages, claiming the stipulated price of the five thousand tons as liquidated damages. The defense is, first, that the defendants are not bound because the plaintiffs were not bound by the covenant, the obligations thereof being mutual or dependent; and second, that the plaintiffs can recover only their actual damages, the stipulated damages being manifestly designed as a penalty.

The first question is: Did the plaintiffs bind themselves by the covenant? The contract was not executed by the plaintiffs in person, but it was negotiated for them and signed by their agent, J. S. Bradstreet, who had a sufficient power of attorney under seal. The contract begins thus: "Agreement made this fifteenth day of February, 1878, between the Centennial Ice Company, of Pittston, Maine, party of the first part, by J. S. Bradstreet, agent, and Joseph K. Baker, of Dennisport, Mass., and E. C. Baker, of Providence, R. I., parties of the second part, witnesseth." The stipulations contained in the body of the instrument purport to be stipulations between "the said party of the first part" and "the said parties of the second part," no names being given. It concluded as follows, to wit:

"In witness whereof, the parties have hereunto affixed their hands and seals the year and day first above written.

(Signed) "J. S. Bradstreet, Agent. [L. S.]
"J. K. Baker. [L. S.]
"E. G. Baker. [L. S.]"

The defendants contend that the execution was ineffectual because the instrument does not contain the signatures of the party of the first part by their agent, but only the signature of the agent himself. Undoubtedly, in the execution of a deed by an agent, the most approved form is for the agent to sign the name of his principal, writing his own name below, with the word "agent" following, and the preposition "by" preceding it. See City of Providence v. Miller, 11 R. I. 272, 277, and cases there cited. But the form is not material provided it appears on the face of the instrument that the deed was executed by the principal acting through his agent and not by the agent himself. In Wilks v. Back, 2 East 142, an arbitration bond was given by Mathias Wilks for himself, and under a power, for his co-partner, James Browne. The signatures were affixed as follows, to wit: "Mathias Wilks, [L. S.]." "For James Browne, Mathias Wilks [L. S.]." The Court of King's Bench decided that the execution was good. "Here the bond was executed," say the court, "by Wilks for and in the name of his principal, and this is distinctly shown by the manner of making the signatures. Not even this was necessary to be shown, for if Wilks had sealed and delivered it in the name of Browne, that would have been enough without stating that he had so done." The case was followed with approval in Mussey v. Scott, 7 Cush. 215, where the form of the signature was "B for A." It was also followed by the Supreme Court of Vermont

in McDaniels v. Flower Brook Manuf. Co., 22 Vt. 274. There the operative clauses were in the name of the corporation "by William Wallace, their agent;" the covenants were in the name of the corporation. The deed concluded, "In witness whereof, we have hereunto set our hand and seal," and the signature was, "William Wallace, Agent for the Flower Brook Manufacturing Company." The court said that the execution, in connection with what preceded it, must be understood to be an execution in the name of the company. And see to the same effect, Martin v. Almond, 25 Mo. 313. It seems to us that there is no material distinction between these cases and the case at bar. The case at bar would be identical with them if the words "for the Centennial Ice Company" had been added to the signature. But those words, if added, would express nothing which is not expressed without them by the signature, taken in connection with the testimonium clause and covenant which precede it. The seal is stated in said clause to be the seal of the principals, and the hand to be their hand, evidently because the agent signed for them. In Abbey v. Chase, 6 Cush. 54, and Ellis v. Pulsifer et al., 4 Allen 165, the Supreme Judicial Court of Massachusetts decided that such an execution did not bind the agents, the action being against the agents, but expressly refrained from saying that it did not in their opinion bind the principals. See, also, Varnum, Fuller & Co. v. Evans, 2 McMullan 409; Hunter's Admr's v. Miller's Exec'rs, 6 B. Mon. 612; Bryan v. Stump, 8 Gratt. 241; M'Ardle v. The Irish Iodine Company, 15 Ir. C. L. Rep. 146. It is true that some of the textbooks say, and some of the cases seem to imply, that the name of the principal must necessarily appear in the signature. But we do not see the necessity. When A, being agent for B, signs the deed, "A for B," or "A, agent for B," his own name is the signature, the other words being used to denote that he makes the signature, not for himself, but for his principal. And surely, if this be so, it is unnecessary to use those words if the thing which is denoted by them be otherwise apparent.

The defendants cite and rely on Townsend v. Corning, 23 Wend. 435; Townsend v. Hubbard, 4 Hill (N. Y.) 351; Brinley v. Mann, 2 Cush. 337; Lessee of Clarke v. Courtney, 5 Pet. 319, 350; but in each of these cases the deed was not only signed in the name of the agent, but the seal was stated in the testimonium clause to be his seal. Of course the deed could not be the deed of the principal unless the seal was his seal. Indeed, in Townsend v. Hubbard, *supra,* Chancellor Walworth declared that no particular form of words is necessary to make the deed the deed of the principal, "provided it appears upon the face of the instrument that it was intended to be executed as the deed of the principal, and that the seal affixed to the instrument is his seal and not the seal of the attorney or agent merely." In Bellas v. Hays, 5 Serg. & R. 427, likewise cited for the defendants, it did not appear that the seal was the seal of the principal, there be-

ing an instrument under seal, and it was sufficient to use the seal of the agent. The agent, moreover, signed his own name simply, without the word "agent" appended. The counsel for the defendants quote the words of Judge Story in Longee v. Clarke v. Courtney, supra, that "the law looks not to the intent alone, but to the fact whether that intent has been executed in such manner as to possess a legal validity." Undoubtedly. But in his work on Agency, Judge Story, treating of this matter, says: "In all cases where the instrument purports on its face to be intended to be the deed of the principal, and the mode of execution of it by the agent, however irregular and informal, is not repugnant to that purport, it would probably be construed to be the deed of the principal, especially where the in testimonium clause is that the principal has thereto affixed his seal." Story on Agency, § 153, cited in Martin v. Almond, supra. Our conclusion is that the plaintiffs were bound by the contract, and, therefore, that the action can be maintained.[1] * * *

DAWSON v. COTTON.

1866. Supreme Court of Indiana. 26 Ind. 67.

In the action [Henry T. Dawson v. Cyrus Cotton] the writ was in assumpsit, and the declaration in debt, on a promissory note, of which the following is a copy:

"$442. Twenty days after date I promise to pay to James Thompson, or order, four hundred and forty-two dollars, value received. Given under my hand and seal this 2nd day of December, A. D. 1859.

"Whiteford Wilson. [Seal.]

Agent for Cyrus Cotton. Seal."

The plaintiff declared as the endorsee of the payee; and the defendant pleaded, non assumpsit, payment, and non est factum, the last plea being verified by affidavit. On the trial, as the bill of exceptions shows, the plaintiff offered in evidence the note declared on, and the endorsement thereon; and the defendant objected to its introduction "on the specific and single ground that it was not, on the face of the note itself, signed and sealed in such a manner as to make the defendant liable, but the agent only by whom it was executed (if any one) was liable. The court decided that said note on its face was therefore inadmissible before the jury, and thereupon sustained the objection to it and excluded it from the jury"; to which

[1] A portion of the opinion is omitted.

[2] In Morrow v. Story, 7 Cush. (Mass.) 512, it was held that a deed executed "B per X" is the deed of B.

ing no testimonium clause, and it was assumed to be the seal of the agent. The agent, moreover, signed his own name simply, without the word "agent" appended. The counsel for the defendants quotes the words of Judge Story in Lessee of Clarke v. Courtney, *supra,* that "the law looks not to the intent alone, but to the fact whether that intent has been executed in such manner as to possess a legal validity." Undoubtedly. But, in his work on Agency, Judge Story, treating of this matter, says: "In all cases where the instrument purports on its face to be intended to be the deed of the principal, and the mode of execution of it by the agent, however irregular and informal, is not repugnant to that purport, it would probably be construed to be the deed of the principal, especially where the in testimonium clause is that the principal has thereto affixed his seal." Story on Agency, § 153, cited in Martin v. Almond, *supra.* Our conclusion is that the plaintiffs were bound by the contract, and, therefore, that the action can be maintained.[1] * * *[2]

DAWSON v. COTTON.

1855. Supreme Court of Alabama. 26 Ala. 591.

In this action (Henry T. Dawson v. Cyrus Cotton) the writ was in *assumpsit,* and the declaration in *debt,* on a promissory note, of which the following is a copy:

"$442. Twenty days after date I promise to pay to James Thompson, or order, four hundred and forty-two dollars, value received. Given under my hand and seal this 22d day of December, A. D. 1835.

"Benjamin Watson, [seal]
"Agent for Cyrus Cotton, Sen."

The plaintiff declared as the endorsee of the payee; and the defendant pleaded, *nil debet,* payment, and *non est factum,* the last plea being verified by affidavit. On the trial, as the bill of exceptions discloses, the plaintiff offered in evidence the note declared on, with the endorsement thereon; and the defendant objected to its introduction "on the specific and single ground that it was not, on the face of the note itself, signed and sealed in such a manner as to make the defendant liable, but the agent only by whom it was executed (if any one) was liable. The court decided that said note, on its face, was absolutely inadmissible before the jury, and therefore sustained the objection to it and excluded it from the jury;" to which

[1] A portion of the opinion is omitted.

[2] In Mussey v. Scott, 7 Cush. (Mass.) 215, it was held that a deed executed "B for A" is the deed of A.

ruling of the court the plaintiff excepted and was forced to take a nonsuit.

This ruling of the court is now assigned for error.

CHILTON, C. J.—The sole question in this case is whether the note offered in evidence, unaccompanied with any offer of extraneous proof explanatory of it, was proper evidence for the jury; in other words, whether it created, *prima facie*, an obligation upon Cotton, the alleged maker. It is in these words:

"Twenty days after date I promise to pay to James Thompson, or order, four hundred and forty-two dollars, value received. Given under my hand and seal this 22d day of December, 1835.

"(Signed) BENJAMIN WATSON, [SEAL]
"Agent for Cyrus Cotton, Sen."

In Martin v. Dortch, 1 Stew. 479, a sealed instrument, executed substantially as the above, was held to be well executed by the person for whom the maker described himself as agent; but this decision was virtually overruled in Skinner v. Gunn, 9 Porter 305, and (we think) cannot be regarded as a correct exposition of the law. We perceive no difference, in principle, between this case and that of Skinner v. Gunn, *supra*. True, in that case the body of the instrument read, "I, Isaac Hughes, for and in consideration," etc., and concluded, "In witness whereof I have hereunto set my hand and seal—(Signed) I. Hughes [SEAL], Attorney for Livingston Skinner," while in this case, the name is not put in apposition with the pronoun. But it is too clear to admit of any doubt that the pronoun stands for Watson, whose seal is attached, and who, in the attestation, says, "witness my hand and seal." It is, in our opinion, the seal and obligation of Watson, and the addition of "Agent for Cyrus Cotton, Sen.," must be regarded as descriptive of the person. See Carter v. Doe *ex dem.* Chandron, 21 Ala. Rep. 72, where the principle here involved is incidentally discussed and a number of the authorities cited. Story on Agency, § 151; Story on Contracts (3d ed.), §§ 141, 142. Whether a different interpretation might not be given to the instrument, if it had not been under seal, it is not necessary now to decide.

Let the judgment be affirmed.[1]

[1] *Accord:* Kiersted v. Orange, etc., R. R. Co., 69 N. Y. 343.

"The rule is unquestioned, that a conveyance executed by an agent or attorney, to operate in a court of law as a transfer of the right and interest of the principal must be made in the name of the principal and must be executed as his deed. There is no rule of law more firmly settled, and supported by greater uniformity of decision, though it may seem narrow and technical, and may often operate [to] the disappointment of the clear and manifest purpose and intention of the parties." Brickell, C. J., in Taylor v. Agricultural, etc., Assn., 68 Ala. 229, 237.

See Woodbury v. King (N. Car.), 68 S. E. 221.

MITCHELL v. HAZEN.

[illegible] Supreme Court of Connecticut. 4 Conn. 495.

[illegible] Co. J.—Did the defendant bind himself by his covenants [illegible] This is the next question. The deed executed by him [illegible] 'Lyall Hazen, Administrator,' and he covenants [illegible] and administrator, covenant with the said Timothy, his [illegible] that at and until the ensealing of these presents, I [illegible] of the premises, as a good, indefeasible estate in fee [illegible] full right to convey and sell the same to the [illegible] as above written; and that the same is free from all [illegible] whatsoever, except as above. These covenants must be [illegible] high effect, at the words often quem fecit, and consider [illegible] the intention of the parties at the time of making them; [illegible] covenants are doubt in respect of their meaning, they are [illegible] to that sense which is the least strong against the covenantor [illegible] favorable to the other party. Dodder v. Swain, 1 Lev. [illegible] 1 Sid. 191; Sumner v. Eddington, And. 69; 1 Ruled. 1755; [illegible] Co. Litt. 183; Floyd. 180.

[illegible] also that the power of sale given by the court [illegible] of the defendant, without preventing the estate in [illegible] to be executed, authorized him to make such an instru- [illegible] as was legally proper for the conveyance of the deceased's [illegible] England v. Clay, 1 P. Wms. 521; 2 Cruise's Dig. 154. [illegible] was not required by his duty and trust to enter into [illegible] covenant for the warranty of the title to the property [illegible] for the validity of the conveyance, and it has not been [illegible] that for this purpose he had authority to bind the [illegible] or to subject the assets. It is unquestionable that [illegible] himself personally his formal and solemn covenants [illegible] a conveyance, and was of perfect right. Although it [illegible] sufficient to enter into covenants for and in the name [illegible] show it clearly in this manner the confidence of par- [illegible] enlarge the powers of the sale upon the general [illegible] covenants to do anything that for the most part [illegible] useful or good. Sheppard's Touchstone, 150. [illegible] covenants are to be construed as having any effect [illegible] held as binding on him personally, for they can [illegible] on any other person. So it the words of his covenant [illegible] inconsistent with the meaning, he, and he only, intended to be [illegible] the covenantor of them.

[illegible] as [illegible] due to his covenantee, and must be [illegible] for the [illegible] and circumstances, which [illegible] [illegible] in an [illegible] Sale. [illegible] respect, [illegible] the [illegible] Court.

ruling of the court the plaintiff excepted and was forced to take a nonsuit.

This ruling of the court was [illegible] for error.

Caldwell, J., [illegible]—The only question in this case is whether the note executed to [illegible] by the defendant [illegible] any order of ex parte [illegible] preliminary [illegible] for the hire, or other [illegible] whether it [illegible] an obligation upon Cotton [illegible]

"Twenty days after date I promise to pay to James Thompson or order four hundred and [illegible] dollars, value received. Given under my hand and seal this [illegible] December, 1855.

[illegible] Waters [SEAL]

"Agent for Cyrus Cotton, Sen."

[illegible] a sealed instrument, executed [illegible] by the person [illegible] himself as agent; but this decision was evidently [illegible] Cason, 9 Porter 305, and [illegible] strict exposition of the law. We [illegible] between this case and that of [illegible] in the case the body of the instrument [illegible] "in consideration," etc., and [illegible] "In witness whereof I have hereunto set my hand and seal," signed [illegible] "Lexington Skinner," while in the [illegible] not in opposition with the promise. But [illegible] action of any doubt that the promissory words [illegible] seal is attached, and who, in the [illegible] and seal." It is in our opinion, the seal and [illegible] Cotton, and the addition of "Agent for Cyrus Cotton, Sen." [illegible] descriptive of the person. See Carter v. [illegible] 72, where the principle [illegible] and a number of the authorities [illegible] 1 Par. Contracts [illegible] 141. Story on Contracts [illegible] a literal interpretation might [illegible] to the [illegible] and, if not

[illegible]

[illegible] 2 Ala. [illegible]

"On sale in [illegible] to agent or attorney, to execute a [illegible] the payment of the [illegible] bond is [illegible] and as [illegible] [illegible] supported by greater authority [illegible] and may effect [illegible] purpose and intention of the parties." [illegible] 68 Ala. 208.

See Woodbury v. Long, 68 Me. [illegible]

MITCHELL v. HAZEN.

1823. Supreme Court of Connecticut. 4 Conn. 495.

Hosmer, Ch. J.—Did the defendant bind himself by his covenants personally? This is the next question. The deed executed by him was signed, "Elijah Hazen, Administrator," and his covenants were in the following words: "I, the said Elijah, do for myself, my heirs, executors and administrators, covenant with the said Timothy, his heirs and assigns, that at and until the ensealing of these presents, I am well seised of the premises, as a good, indefeasible estate in fee-simple; and have good right to bargain and sell the same in manner and form as above written; and that the same is free from all incumbrances whatsoever, except as above." These covenants must be construed with effect, *ut res magis valeat quam pereat,* and correspond with the intention of the parties at the time of making them; and if there remains any doubt in respect of their meaning, they are to be taken in that sense which is the most strong against the covenanter and beneficial to the other party. Hookes v. Swain, 1 Lev. 102; s. c. 1 Sid. 151; Amner v. Luddington, And. 60; 1 Bulstr. 175; Hob. 304; Co. Lit. 134; Plowd. 156.

It is indisputably clear that the power of sale given by the court of probate to the defendant, without prescribing the manner in which it was to be executed, authorized him to make such an instrument only as was legally proper for the conveyance of the deceased's estate. Longford v. Eyre, 1 P. Wms. 741; 4 Cruise's Dig. 254. The defendant was not required by his duty and trust to enter into any personal covenant for the security of the title to the property conveyed, nor for the validity of the conveyance, and it has not been contended that for this purpose he had authority to bind the heir of the deceased or to subject the assets. It is unquestionable that unless he bound himself personally his formal and solemn covenants under seal were a nonentity, and *vox et preterea nihil.* Although he was under no obligation to enter into covenant, he was at liberty to do it, if he chose to excite in this manner the confidence of purchasers, or to enlarge the proceeds of the sale, upon the general principle that a covenant to do anything that for the substance and matter of it is lawful is good. Sheppard's Touchstone, 159. If the covenants of the defendant are to be construed as having any effect, they must be considered as binding on him personally, for they can be obligatory on no other person. So if the words of his covenant are at all indicative of his meaning, he, and he only, intended to be holden to the performance of them.

It is worthy of remark that he has covenanted, not only for himself, but for his heirs, executors and administrators, which places his intention in an irrefragible light. With respect, then, to the in-

tentions of the covenanter, or the effect of his covenants, there can exist no serious question, unless the mind will admit the palpable absurdity that he meant nothing. There being subjoined to this signature the word "administrator," and the subject-matter of his conveyance being the estate of other persons, cannot invalidate the construction given to his act. The former was unnecessarily, I admit, a *descriptio personæ* only, and the latter is not prohibitory of any lawful agreement he should please to make. It has long been an established principle that whenever a man undertakes to stipulate for another by an instrument under seal, without authority, or beyond authority, he is answerable personally for the non-performance of his contracts; and if he choose to bind himself by a personal covenant, he is legally liable for a breach of it, even although he describe himself as covenanting as trustee, agent, executor or administrator. Appleton v. Binks, 5 East 148; Thacher v. Dinsmore, 5 Mass. 299 (4 Am. Dec. 61); Sumner v. Williams, 8 *Id.* 162 (5 Am. Dec. 83); Duvall v. Craig, 2 Wheat. 45; White v. Cuyler, 6 T. R. 176; Wilkes v. Back, 2 East 142; Tippets v. Walker, 4 Mass. 595; Thayer v. Wendall, 1 Gall. 37.

The determinations in Sumner v. Williams and Duvall v. Craig go the full length of the present case, and are applicable to it on a principle of strict analogy. The case of Coe v. Talcott, 5 Day 88, is a strong authority in support of the opinion expressed, and contains this important principle: that "a trustee acting within his powers does not render himself liable on his contracts and conveyances; but wherever he exceeds his powers and undertakes to transfer and convey without authority, he becomes personally answerable to the grantee on his covenants." This is precisely the case before the court. The defendant exceeded the powers with which he was invested, and undertook to transfer and convey, in a manner which he had no right to do, and, therefore, without authority. It results, then, that he is personally liable, on the principle of the case last cited, as well as on the other legal grounds before discussed.

HALE v. WOODS.

1839. Superior Court of Judicature of New Hampshire. 10 N. H. 470.

The deed of an attorney must be in the name, and purport to be the act and deed of the principal.

Where the grant and covenants of the deed were in the name of the principal, and the attorney executed the deed as follows: "D. K., attorney for Z. K.," it was held to pass the interest of the principal.

WRIT of entry to recover a tract of land situated partly in Nashua and partly in Hollis, in the county of Hillsborough.

The demandant gave in evidence, in support of his title, a deed from Daniel King, for himself and Zachariah King, to the demandant. The form of the deed is set forth in the opinion of the court; and it becomes unnecessary to state it in the case.

Daniel King was duly empowered by Zachariah to execute the deed; and the only question was, whether the deed was duly executed to pass the interest of Zachariah as well as of Daniel, they being tenants in common of the premises described in the deed.

If it passed the interest of Zachariah, the demandant held the title of one-half the demanded premises. If it passed Daniel's right merely, he held the title in only one-fourth of the demanded premises.

The court instructed the jury that the title and interest of Zachariah were passed to the demandant by the deed.

The jury returned a verdict for the demandant, for one-half of the demanded premises, and the tenant moved to set the same aside for misdirection of the court.

UPHAM, J.—The deed of an attorney, to be valid, must be made in the name and purport to be the act and deed of the principal. Fowler v. Shearer, 7 Mass. 14; Elwell v. Shaw, 16 Mass. 42; Stinchfield v. Little, 1 Greenl. 231; Elwell v. Shaw, 1 Greenl. 339; Cofran v. Cochran, 5 N. H. 459; Montgomery v. Dorion, 7 N. H. 475. But whether such is the purport of an instrument must be determined from its general terms, and not from any particular clause. Such construction must be given in this, as well as in other instruments relating to conveyances, as shall make every part of the instrument operative as far as possible; and where the intention of the parties can be ascertained, that intention should be carried into effect, if it can be done consistently with the rules of law. Jackson v. Blodgett, 16 Johns. 172; Parker v. Washington, 1 Mass. 530; Emery v. Hayden, 9 Mass. 514; Hobbs v. Dwight, 17 Mass. 150.

The deed which is under consideration in this case was executed by Daniel King, for himself and for Zachariah King, a joint owner of the land. The terms of the conveyance are: "I, Daniel King, as well for myself as attorney for Zachariah King, do for myself and for said Zachariah, release and forever quitclaim the premises described in the deed, together with all the estate, right, title, interest, use, property, claim and demand whatsoever, of me, the said Daniel and said Zachariah, which we now have, or hereafter may have in and to said premises. And we, the said Daniel and Zachariah, do hereby, for ourselves, our heirs and assigns, covenant that the premises are free from all incumbrances; and that the grantee shall quietly enjoy the same, without any molestation from us, or any one claiming under us, or either of us. In testimony whereof, we, the said Daniel, for himself, and as attorney of Zachariah, have hereunto set our hands and seals," etc. Signed Daniel King and seal. "Daniel

Writ of entry, to recover a tract of land situated partly in Nashua and partly in Hollis, in the county of Hillsborough.

The demandant gave in evidence, in support of his title, a deed from Daniel King, for himself and Zachariah King, to the demandant. The tenor of the deed is set forth in the opinion of the court, so that it becomes unnecessary to recite it in the case.

Daniel King was duly empowered by Zachariah to execute the deed; and the only question was, whether the deed was duly executed to pass the interest of Zachariah as well as of Daniel, they being tenants in common of the premises described in the deed.

If it passed the interest of Zachariah, the demandant held the title of one-half the demanded premises. If it passed Daniel's right merely, he held the title in only one-fourth of the demanded premises.

The court directed the jury that the title and interest of Zachariah were transferred to the demandant by the deed.

The jury returned a verdict for the demandant, for one-half of the demanded premises, and the tenant moved to set the same aside for misdirection of the court.

Upham, J.—The deed of an attorney, to be valid, must be in the name, and purport to be the act and deed of the principal. Fowler v. Shearer, 7 Mass. 14; Ellwell v. Shaw, 16 Mass. 42; Stinchfield v. Little, 1 Greenl. 231; Ellwell v. Shaw, 1 Greenl. 339; Cofran v. Cochran, 5 N. H. 459; Montgomery v. Dorion, 7 N. H. 484. But whether such is the purport of an instrument must be determined from its general tenor, and not from any particular clause. Such construction must be given in this, as well as in other questions arising on conveyances, as shall make every part of the instrument operative as far as possible; and where the intention of the parties can be discovered, such intention should be carried into effect, if it can be done consistently with the rules of law. Jackson v. Blodgett, 16 Johns. 172; Bridge v. Wellington, 1 Mass. 219; Davis v. Hayden, 9 Mass. 514; Hatch v. Dwight, 17 Mass. 289.

The deed which is under consideration in this case was executed by Daniel King, for himself and for Zachariah King, a joint owner of the land. The terms of the conveyance are: "I, Daniel King, as well for myself as attorney for Zachariah King, doth for myself and the said Zachariah, remise, release, and forever quitclaim the premises described in the deed, together with all the estate, right, title, interest, use, property, claim and demand whatsoever, of me, the said Daniel and said Zachariah, which we now have, or heretofore had at any time in said premises. And we, the said Daniel and Zachariah, do hereby, for ourselves, our heirs and executors, covenant that the premises are free from all incumbrance, and that the grantee may quietly enjoy the same without any claim or hindrance from us, or any one claiming under us, or either of us. In witness whereof, we, the said Daniel, for himself, and as attorney aforesaid, have hereunto set our hands and seals," etc. Signed, Daniel King, and also, "Daniel

King, attorney for Zachariah King, being duly authorized as appears of record," with seals affixed to each signature.

The covenants in this case in the deed are clearly the covenants of the principal, and we think, from the terms used, the grant purports to be the act of the principal. The grant is for said Daniel and Zachariah, of all the interest which *we* now have or have heretofore had in the premises. If these terms, together with the covenants, purport a conveyance of the interest of the principal, the execution of the deed would seem to be sufficient to effect the intent of the instrument.

In Wilks v. Back, 2 East. 142, the court say: "There is no particular form of words required to be used, provided the act be in the name of the principal, for where is the difference between signing I. B., by M. W., his attorney (which must be admitted to be good), and M. W. for I. B.? In either case the act of sealing and delivery is done in the name of the principal, and by his authority. Whether the attorney put his name first or last, cannot affect the validity of the act done." 2 Stark Ev. 477, 605; see also, Montgomery v. Dorion, 7 N. H. 484, where the principle of the case of Wilkes v. Back is fully sustained.

We are of opinion that the deed as executed passed the title both of Daniel and Zachariah King. The plaintiff is, therefore, entitled to recover one-half the demanded premises, and judgment will be entered on the verdict for that amount.[1]

WOOD v. GOODRIDGE AND ANOTHER.

1850. SUPREME JUDICIAL COURT OF MASSACHUSETTS. 6 Cush. 117.

THIS was an action of trespass to land.

BENJAMIN GOODRIDGE, SR., of Lunenburg, on the 12th of April, 1832, executed and delivered to Levi Goodridge, one of the defendants, under his hand and seal, and in the presence of subscribing witnesses, a power of attorney, of which the following is a copy:

"Know all men by these presents, that I, Benjamin Goodridge, of

[1] "The objection to the admission of the deed was, that the name of the attorney, instead of the name of the principal, was signed to it. There was, however, enough on the face of the deed to show that the attorney, in thus signing his own name, was acting as attorney and not as principal. That being so, the deed was unquestionably a good execution of the power in equity." Benning, J., in Tenant v. Blacker, 27 Ga. 418, 421.

"No particular form of words is necessary for an agent to bind his principal, if he expresses in the instrument the capacity in which he acts. Deeds are to receive a construction from the whole taken together; and every deed ought to be so construed as to effect the intention of the parties." Peters, J., in Magill v. Hinsdale, 6 Conn. 464, 469.

[illegible] for Parties to [illegible] duly executed as appears [illegible] with seals affixed & usually signatures.

[illegible] Covenants in the [illegible] Deed clearly the covenants of the Intestate and are [illegible] the words used, we admit your rule to be the rule of the [illegible] The grant is to him and Daniel and [illegible] of all the [illegible] they have. It have heretofore [illegible] the premises [illegible] together with the covenants, [illegible] a conveyance [illegible] the principal, the execution [illegible] would [illegible] be necessary to effect the intent of the instrument.

In Wilkes v. Back [illegible] the court says: "There is no particular form of [illegible] to be used provided the act be in the name of the principal [illegible] is the difference between signing [illegible] as agent, or [illegible] which must be construed to be good); and if A. for [illegible] executes a deed in the presence of a witness and delivery is done in the name of the principal, and by his authority. Whether the [illegible] put his name and seal to the contract affects the validity of the [illegible] Montgomery v. Dorion, 7 N. H. 484. [illegible] extension of the case of Wilkes v. Back is fully warranted.

We are of opinion that the deed as executed passed the title [illegible] to Daniel and [illegible] same. The plaintiff is, therefore, entitled to [illegible] judgment will be entered on the [illegible] agreed.

[illegible] v. Coolidge and another.

[illegible] Commissioners' Deed. 6 Cush. 117.

[illegible] Lunenburg, on the 12th of April, [illegible] Coolidge, one of the defendants, [illegible] and at the request of [illegible] subscribing [illegible] stated that the following is a copy:

[illegible] that I, Isaac [illegible] Coolidge, of

[illegible] deed was that the name of the attorney [illegible] principal was signed to it. There was, however, [illegible] to show that the attorney, in executing the deed, [illegible] as attorney and not as principal. This being so, [illegible] a good execution of the power in many [illegible] Bac. Ab. [illegible] Co. Litt. 352.

[illegible] necessary for an agent to bind his principal, if he [illegible] the capacity in which he acts. Deeds are to [illegible] the whole [illegible] together; and every deed ought to be so [illegible] as to show the intention of the parties." Piper, J., in Smith v. [illegible] 20 N. H. 466.

Lunenburg, in the county of Worcester and commonwealth of Massachusetts, gentleman, for a good consideration me hereunto moving, have constituted and appointed, and do hereby constitute and appoint my son, Levi Goodridge, of the same Lunenburg, gentleman, my true and lawful attorney, for me and in my name but for my benefit and use, to buy and sell real and personal property, and good and sufficient deeds to make, execute and deliver, in my name, in transferring and conveying the same, also for me and in my name to move and institute all necessary suits in law for the recovery and collection of my demands, and to assert and vindicate my rights, and to appear and defend in all suits to be instituted against me in any courts of law or equity; especially do I empower my said attorney to carry on my sawmill, and buy and sell logs, timber and lumber, and do all necessary things in and about the same, and in general to make such contracts for the profitable improvement and use of such property and other means as I possess for the enlargement of my estate; hereby ratifying and confirming whatsoever my said attorney shall lawfully do in the premises as fully and effectually as I could were I personally present at the doing of the same. In witness whereof I have hereunto set my hand and seal this twelfth day of April, in the year of our Lord one thousand eight hundred and thirty-two."

On the 28th of April, 1834, Levi Goodridge, professing to act therein under his power of attorney, made a promissory note to Sewall Goodridge, and executed a mortgage to secure the same, both in the name of Benjamin Goodridge, senior. The note was in the common form, for $338.52, payable to Sewall Goodridge or order, and signed, in the presence of a subscribing witness, "Benjamin Goodridge, by his attorney, Benjamin Goodridge." The body of the note was written by an attorney, employed by Levi Goodridge to prepare the papers, and by whom the words "Benjamin Goodridge, by his attorney," were also written, to be followed by the signature of Levi Goodridge; but the latter, instead of writing his own name, wrote that of Benjamin Goodridge.

The mortgage deed was also written by the same attorney, at the request of Levi Goodridge, who produced the power of attorney above mentioned, and stated that he was authorized to execute the deed by Benjamin Goodridge, senior, and he accordingly signed the name of "Benjamin Goodridge" to the deed without adding his own signature as attorney, or any words to indicate that the signature was not made by Benjamin Goodridge himself; nor did the body of the deed contain any statement indicating that it was made by Benjamin Goodridge by his attorney, or in any other manner than by him personally. The deed was acknowledged by Levi Goodridge, before a justice of the peace, as the attorney of Benjamin Goodridge, to be the deed of the latter.

The power of attorney and the mortgage were duly recorded in

the registry of deeds, at the same time, and the mortgage subsequently foreclosed.

The place of the supposed trespass was embraced in the mortgage, and the plaintiff claimed title under the same by mesne conveyances from Sewall Goodridge. The defendants derived their title by conveyances from Benjamin Goodridge, senior; upon which sundry questions were raised and argued, which became immaterial by the view taken by the court of the case for the plaintiff.

The case was submitted to the court of common pleas, and by appeal to this court, upon an agreed statement, from which the foregoing facts appeared.

FLETCHER, J.—The first question, as to the plaintiff's title to the land, is, whether the form of executing the mortgage and note by the attorney was a legal execution of his power as such; whether signing the name of the principal, Benjamin Goodridge, as if it were his own personal act and signature (if not appearing upon the instruments to be done by Levi as attorney), was a good execution of the instruments under the power, so as to make them valid as the deed and note of Benjamin, and thus effectually to convey the land to Sewall Goodridge by the mortgage, under which the plaintiff's title is derived.

When one writes the name of another to a deed, in his presence, at his request, and by his direction, the act of writing is regarded as the party's personal act, as much as if he had held the pen, and signed and sealed the instrument with his own hand. Story, Ag., § 51; Ball v. Dunsterville, 4 T. R. 313; Lovelace's Case, W. Jones, 268; Hibblewhite v. M'Morine, 6 M. & W. 200, 214, 215; Gardner v. Gardner, 5 Cush. 483.

In the present instance, the deed and note were not executed by Benjamin personally; nor in his presence, but in his absence; and, so far as appears, without his knowledge. But, upon the face of the papers, they appear to have been signed by him personally and with his own hand. In fact, they were signed by Levi; but it does not appear, upon the face of the papers, that in signing the name of Benjamin, Levi acted as his agent, or intended to act under the power of attorney from Benjamin, or meant to execute the authority given by that power.

The deed and note, which thus appear to be signed by Benjamin personally, when, in fact, they were signed by Levi, are not such instruments as Levi was authorized to make. He was authorized to make instruments in the name of Benjamin; not as made by Benjamin personally; but by Levi, in his name, as his attorney. It should appear upon the face of the instruments that they were executed by the attorney, and in virtue of the authority delegated to him for this purpose. It is not enough that an attorney in fact has authority, but it must appear by the instruments themselves which he executes that he intends to execute this authority. The instruments should be

made by the attorney expressly as such attorney; and the exercise of his delegated authority should be distinctly avowed upon the instruments themselves. Whatever may be the secret intent and purpose of the attorney, or whatever may be his oral declaration or profession at the time, he does not in fact execute the instruments as attorney, and in the exercise of his power as attorney, unless it is so expressed in the instruments. The instruments must speak for themselves. Though the attorney should intend a deed to be the deed of his principal, yet it will not be the deed of the principal, unless the instrument purports on its face to be his deed. The authority given clearly is, that the attorney shall execute the deed as attorney, but in the name of the principal.

There is much learning and much discussion in the books of the law as to the proper mode of executing authority by agents. In what form the agent should execute his authority, so as to bind his principal, and not bind himself, has been a subject largely considered in elementary works, and much discussed in numerous adjudged cases. The rule commonly laid down by all the authorities is, that to bind the principal, the instrument must purport, on its face, to be the instrument of the principal, and executed in his name; or, at least, that the tenor of the instrument should clearly show that the principal is intended to be bound thereby and that the agent acts merely as his agent in executing it.

But it is contended that it is nowhere laid down in any work of authority, or established by any adjudged case, that the agent may put the name of the principal, as his own personal act and signature; the execution of the agent, as agent, not being in any way disclosed. Such an execution does not appear to be warranted by the power delegated to execute the instrument as attorney, but in the name of the principal.

If such a mode of execution is proper and legal it seems most remarkable that it is nowhere stated or suggested in any work of authority. The execution of instruments by agents in this way would certainly be attended with great difficulties and dangers. If the agent might execute instruments in this mode, the principal, if he found his name signed to an instrument, would have no means of knowing by whom it had been signed or whether he was bound or not bound by such signature; and other persons might be greatly deceived and defrauded by relying upon such signature as the personal act and signature of the principal, when the event might prove that it was put there by an agent who had mistaken his authority, and consequently that the principal was not bound. When it should be discovered that the name of the principal was not written by him, as it purports to be, it might be wholly impossible to prove the execution by attorney, as there would be nothing on the note to indicate such an execution. For authorities as to the form of execution of the mortgage and note, see Story Ag., §§ 147, 148, 153, notes, and

cases cited; Hoffman's opinion, in 3 Am. Jur. 71-85; Wilks v. Back, 2 East 142; Story, Notes, §§ 11, 66, 71. In the case of Stackpole v. Arnold, 11 Mass. 27, 29, PARKER, C. J., said: "No person in making a contract is considered to be the agent of another unless he stipulates for his principal by name, stating his agency in the instrument which he signs. This principle has been long settled, and has been frequently recognized; nor do I know an instance in the books of an attempt to charge a person as the maker of any written contract, appearing to be signed by another, unless the signer professed to act by procuration or authority, and stated the name of the principal on whose behalf he gave his signature."

There is a *dictum* of LAWRENCE, J., in the case of Wilks v. Back, 2 East 142-145, which would seem to import that an agent might put his principal's name without stating it to be by attorney. But it is but a *dictum,* the import of which is not entirely clear and certain.

Though there is no direct authority to the point, the court are inclined to think, that the execution of the mortgage and note, in the present case, were not such as the attorney was authorized to make, and not such as to make them valid and binding.[1] * * *[2]

(b) NEGOTIABLE INSTRUMENTS.

ANDERTON ET AL. V. SHOUP, TRUSTEE.

1866. SUPREME COURT OF OHIO. 17 Ohio St. 126.

ERROR to the superior court of Montgomery county.

Miriam H. Anderton and James Anderton, her husband, brought their action in the superior court of Montgomery county, against George W. Shoup, as trustee for Harriet Shoup, on the following instrument:

"DAYTON, August 11, 1861.

"Dayton branch, State Bank of Ohio, pay to J. B., or bearer, two hundred thirty dollars.

"$230. SAMUEL SHOUP, Agent."

The various questions that arose in the progress of the case, resulted, substantially, in one upon demurrer to the amended petition.

It is averred in the petition that Samuel Shoup and Harriet, his

[1] A portion of the opinion is omitted.

[2] "When the deed on its face purports to be the indenture of the principal, made by his attorney in fact therein designated by name, it may be properly executed by such attorney by his subscribing and affixing thereto the name and seal of his principal alone." Cornell, J., in Berkey v. Judd, 22 Minn. 287, 302.

wife, conveyed the property of the said Harriet to the defendant in trust, with authority to use the property in carrying on milling and other business for her benefit, and to employ an agent to assist in such business; that the defendant appointed Samuel Shoup such agent, who, in prosecuting the business, opened an account in the name of the defendant, with the bank named in said instrument, and was in the habit of checking out funds on such account, for the defendant, by checks signed with his own name as agent, with the knowledge and approval of the defendant; that on the 29th day of July, 1861, he drew said "draft or check" and dated it August 11, 1861, and delivered it to Davis & Cuppy, from whom the plaintiffs obtained it, for a valuable consideration, "before it was due;" that the defendant had no funds in said bank when the draft was drawn, nor did he until after its maturity; and that payment was refused by the bank.

The demurrer to the petition was sustained, and judgment was rendered for the defendant; and this petition in error is brought to reverse that judgment.

Day, C. J.—The averments in the petition will not warrant the claim in argument, that this is a case where a party himself uses a name other than his own in the transaction of his business. The most that can be claimed is, that the principal allowed the agent to sign his own name as agent in the transaction of some of the business of the principal.

Indeed, so far from the paper in suit being executed for the purpose of checking out funds for the principal, in the ordinary course of business approved by him, it was, in effect, a time-draft or bill, drawn on the 29th of July, but dated, and therefore payable, on the 11th of August. There were no funds of the principal in bank to draw against, or to set apart by check to the holder; and, for aught that is shown, it was drawn merely for the accommodation of Davis & Cuppy, to be negotiated by them for their own benefit.

The most that can be claimed for the check in the hands of the plaintiffs, as purchasers or holders thereof for a valuable consideration before due, is the application of the rules appertaining to negotiable paper.

Whether the instrument sued upon is a check proper, or a bill of exchange, it is unnecessary for the purposes of this case to determine. Bank-checks "have become ingrafted on the commercial law of the country" (Morrison v. Bailey, 5 Ohio St. 13), and "are in substance bills of exchange, payable on demand." Edw. on Bills 57; Par. Mer. Law 91; Harker v. Anderson, 21 Wend. 373; Chapman v. White, 2 Seld. 412. The differences that distinguish these two classes of commercial paper, growing out of the uses to which they are ordinarily applied, do not affect the question involved.

It is undoubtedly well settled that where an ordinary simple contract is signed by an agent in his own name, with the addition of

the word "agent" thereto, the principal may be made liable thereon, whether his name appears on the paper or not. Story on Agency, § 160a, and authorities there cited. But, for commercial reasons, a distinction is taken, in the authorities, between contracts of this class and negotiable paper. As to bills of exchange, it is said that the agent "must either sign the name of the principal to the bill, or it must appear on the face of the bill itself, in some way, that it was drawn for him, or the principal will not be bound." Edw. on Bills 80; Chitty on Bills 27.

The question as to the liability of the principal, on paper executed by an agent in his own name, was well considered by the supreme court of Massachusetts, in the cases of the Eastern Railroad Company v. Benedict, 5 Gray 561, and the Bank of America v. Hooper, *Ib.* 567.

In the latter case it is said that "there will be found to be a leading distinction taken between cases of commercial paper in the form of bills of exchange, and negotiable promissory notes and other simple contracts, holding that no one but a party to such negotiable paper can be sued for the non-payment thereof." In support of this distinction the following authorities are there cited: Byles on Bills (5th ed.) 26; Emly v. Lye, 15 East 7; Becham v. Drake, 9 M. & W. 92; Pentz v. Stanton, 10 Wend. 276; Stackpole v. Arnold, 11 Mass. 27; Bedford Com. Ins. Co. v. Covell, 8 Met. 442; Taber v. Cannon, *Id.* 456.

The case of De Witt v. Walton, 5 Seld. 571, decided by the New York Court of Appeals, is a strong case to the same point. It was a suit brought on a negotiable promissory note, signed "David Hubbell Hoyt, agent for the Churchman." Hoyt was an agent for a newspaper called "The Churchman," and was authorized to contract for the proprietor in that name, and the suit was against the proprietor, Hoyt's principal. It is said in the opinion that "the good sense of many authorities upon this subject would seem to be that, where a party is sought to be charged upon an express contract it must at least appear upon the face of the instrument that the agent undertook to bind him as principal. Here the promise is not by the defendant or 'The Churchman,' nor by Hoyt for them or either of them, or in their behalf, but for himself. The formula used by him in the signature to the note in controversy has been determined, in this and other states, to create an obligation on the part of the agent personally, and not in behalf of the principal. There is no great hardship in requiring that if a man undertake to oblige another, by note, bill of exchange, or other commercial instrument, he should manifest his purpose clearly and intelligibly, or that his principal will not be bound, whatever may be the result in reference to himself."

It was further held in this case that the words added to the name of the person signing the paper were merely *descriptio personae.*

maintained in these cases, it is said by the author ... Daly's Leading Cases (vol. 2, p. 423) "would seem ... settled on both sides of the Atlantic."

... rules, applied to the case before us, the defense of ... of the defendant is in no way inherent upon the ... upon which alone the action is based ... therefore, that the ruling of the court below was ... and the judgment rendered by it must be affirmed.

EARLY v. WILKINSON & HUNT.

(Supreme Court of Appeals of Virginia. 9 Grat. 68.)

... an action of debt in the circuit court of Kanawha county, ... Wilkinson & Hunt against Robert H. Early. The ... tried in the absence of the court. There was a verdict ... and judgment for the plaintiffs; and Early applied to this court ... a writ of error, which was awarded.

... for the appellant.

... J., delivered the opinion of the court.

... action of debt brought by Wilkinson & Hunt against ... Early on a negotiable note in the following form:

"Kanawha Courthouse, October 3, 1850.

"Six months after date I promise to pay to Wilkinson & Hunt ... or order, negotiable and payable at the office of discount ... of the Bank of Virginia at Charleston, Kanawha ... one hundred and thirteen dollars and fifty cents, for value received.

"Robert H. Early.

"[Per Samuel H. Early.]"

... defendant demurred generally to the declaration and ... Early. The plaintiffs joined in the demurrer, and joined ... the plea. The demurrer was overruled and verdict and ... were rendered for the plaintiffs. On the trial of the issue ... offered to introduce the note as evidence, which the ...

... Negotiable Instruments, § 360.

... Williams, J., [at p. 141] said that a case cited by ... in which it was held that a note payable "on the first day ... in which he could raise the money" was not due until ... a demand of payment.

... Contract of a person who, at the request and ... Early, signs his name as a principal, or as a surety ... Early, on the accommodation of the latter, and without ... delivery as an escrow, has the same legal effect ... delivery as an escrow, has the same legal effect ... negotiable instrument. Early ...

The principle maintained in these cases, it is said by the author of the notes in Smith's Leading Cases (vol. 2, p. 433), "would seem to be well settled on both sides of the Atlantic."

These principles, applied to the case before us, are decisive of it.

The name of the defendant is in no way indicated upon the face of the instrument upon which alone the action is based.

It follows, therefore, that the ruling of the court below was correct, and that the judgment rendered by it must be affirmed.[1]

EARLY v. WILKINSON & HUNT.

1852. Supreme Court of Appeals of Virginia. 9 Gratt. 68.

This was an action of debt in the circuit court of Kanawha county, brought by Wilkinson & Hunt against Robert H. Early. The facts are stated in the opinion of the court. There was a verdict and judgment for the plaintiffs; and Early applied to this court for a supersedeas, which was awarded.

Fry for the appellant.

Moncure, J., delivered the opinion of the court.

This is an action of debt brought by Wilkinson & Hunt against Robert H. Early on a negotiable note in the following form:

$913.50 Kanawha County, October 3, 1850.

Four months after date I promise to pay to Wilkinson & Hunt, or order, without offset, negotiable and payable at the office of discount and deposit of the Bank of Virginia, at Charleston, Kanawha, nine hundred and thirteen dollars and fifty cents, for value received.

Robert H. Early.
(For Samuel H. Early.)

The defendant demurred generally to the declaration and also pleaded *nil debet*. The plaintiffs joined in the demurrer, and joined issue on the plea. The demurrer was overruled, and verdict and judgment were rendered for the plaintiffs. On the trial of the issue the plaintiffs offered to introduce the note as evidence, which the

[1] See Daniel on Negotiable Instruments, § 305.

In Kenyon v. Williams, 19 Ind. 44, it was held that a note signed "A. B., Agt." would not be binding upon the principal at law, but that equity would enforce the note against the principal, when the agent in signing the note was acting within the sphere of his agency.

"Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent or as filling a representative capacity, without disclosing his principal, does not exempt him from personal liability." Negotiable Instruments Law, § 20.

defendant admitted to be wholly in his handwriting; but he objected to its introduction, on the ground that on its face it purported to be the note of Samuel H. Early, and was variant from the note described in the declaration. The court overruled the objection and permitted the note to be given in evidence; to which the defendant excepted. The question which was first argued before us, and first presents itself for our decision, arises upon the opinion of the court overruling the objection to the note as evidence; and perhaps also, upon the judgment of the court upon the demurrer. That question is, whether the note upon its face purports to be the proper note of Robert H. Early, who wrote and signed it, or of Samuel H. Early, for whom it appears, by the words in brackets at the foot of the signature, to have been given?

An agent, in executing a note for his principal, supposing him to have authority to execute such note, may bind either himself or his principal. Whether the one or the other be bound depends upon the intention of the parties; and that intention must appear from the note itself. If the name of the principal be not referred to in the note, the agent who signs it is alone bound. The difficulty arises only in those cases (which, however, are numerous) in which the name of the principal is referred to either in the body of the note or at the foot of it. "As the forms of words in which contracts may be made and executed," says Chief Justice Shaw, in Bradlee v. Boston Glass Co., 16 Pick. R. 347, "are almost infinitely various, the test question is, whether the person signing professes and intends to bind himself, and adds the name of another to indicate the capacity or trust in which he acts, or the person for whose account his promise is made; or whether the words referring to a principal are intended to indicate that he does a mere ministerial act, in giving effect and authenticity to the act, promise and contract of another. Does the person signing apply the executing hand as the instrument of another, or the promising and engaging mind of a contracting party?" "The true and best mode of an agent's signing or endorsing a promissory note for his principal, where he means to make the latter and not himself personally responsible thereon," says Story in his work on Promissory Notes, § 68, "is to sign, or endorse, the same, 'A B, (the principal), by his attorney or agent, C D.' If the signature be 'C D, for A B' (the principal), it will be equally available, though not so formally correct. But in the practice of common life, there are many deviations from this course, and occasionally they give rise to great embarrassments, in endeavoring to ascertain whether, in the actual language used, the agent is personally bound, or the principal alone is bound, or both. Neither is it possible to extract from the authorities any consistent rules to guide us in this matter of interpretation." See Story on Agency, §§ 274-278; 1 American Leading Cases, 2d edition, pp. 625-634, notes.

In the great number and variety of cases on this subject in the re-

ports not one has been found in which the note was similar in form to that which was executed in this case. The note in this case is in the perfect form of a negotiable promissory note of Robert H. Early, except that under his signature are the words "[for Samuel H. Early]," in brackets. Without the addition of these words it is certain that Robert H. Early would alone have been bound on the note, even though he may have given it as the known agent of Samuel H. Early. On the other hand, it may be said that if these words had been added, without being enclosed in brackets, and Robert H. Early had authority to sign the note as agent for Samuel H. Early, the latter would alone have been bound on the note, though the mode of executing the note by procuration would not, in that case, have been strictly formal. The question then depends alone upon the import of the brackets; and though it may seem strange that we should give so much import to a circumstance apparently so slight, yet we are of opinion that it is sufficient to turn the scale, and to indicate an intention on the part of Robert H. Early not to do "a mere ministerial act, in giving effect and authenticity to the promise of another," but "to indicate the capacity or trust in which he acted, or the person for whose account his promise was made." In the construction of the note, the whole of it should be taken together, and effect must, if possible, be given to every part of it. It is not presumable that any word or sign in the note was used without some meaning. We must presume, therefore, that something was intended by the use of the brackets. What was thereby intended? The ordinary use of brackets, in printing, is to enclose a parenthesis; which is defined by lexicographers to be "a sentence so enclosed in another sentence as that it may be taken out without injuring the sense of that which encloses it." Applying that definition to this case, the parenthesis "for Samuel H. Early" may be taken from this note without injuring the sense of the balance, as understood and intended by the parties. The words, "I promise to pay," in the body of the note, will then plainly refer to Robert H. Early, whose name is thereto subscribed as maker. If Robert H. Early had intended to bind, not himself, but Samuel H. Early, as maker of the note, he would have given more prominence to the name of the latter, which then would have been the important name. He would not have enclosed it in brackets, so that it might be taken from the note without injuring the sense of the balance. He would rather have enclosed his own name in brackets, as the name of the mere agent by whom it was signed. They were worse than useless on the supposition that Samuel H. Early was intended to be bound. They certainly cannot contribute in any way to show such an intention. On the other hand, we think they serve to show a contrary intention, an intention to take from the words enclosed the effect they might otherwise have; to give greater prominence to the name of Robert H. over that of Samuel H. Early, and to indicate that the former was the promisor, and the latter the

person for whose account the promise was made, and to whom, as between themselves, the amount of the note was to be charged. This we believe is the only meaning of which the brackets are susceptible. It is a rational meaning, and is consistent with every other part of the note. We therefore believe it was the meaning in which they were used by the author of the note, in whose handwriting it was wholly written, and who would seem to have been familiar with the proper manner of drawing such instruments.

After the court had permitted the note to be given in evidence to the jury, the plaintiffs introduced a witness for the purpose of proving that about a month before the note to the plaintiffs was given a similar note was given to him, except that the words "for Samuel H. Early" were not enclosed in brackets, which note was exhibited on the trial; that credit was given by the witness in that transaction to Robert H., and not to Samuel H. Early; and that when the note was written and handed to him, signed "Robert H. Early, for Samuel H. Early," witness asked Robert H. why he had made and signed the note in that form, to which he replied, that in the case of the death of either his brother or himself, the note would show on which account or for whose benefit it was given, etc. To the introduction of which parol testimony, and the note offered in connection therewith, the defendant objected, on the ground that it was irrelevant and inadmissible. But the court overruled the objection and permitted the evidence to go to the jury; to which the defendant also excepted. The questions arising on this opinion of the court, and argued by the counsel, were: 1st, whether parol evidence was at all admissible in the case; and, if so, 2nd, whether the evidence offered was not irrelevant, and on that ground inadmissible.

First, as to the admissibility of parol evidence in such a case. There is certainly no better settled general rule of law than that parol evidence is inadmissible to contradict or vary the terms of a written contract. There is another general rule, which has been established and recognized by a long series of decisions (but which has been said to be not perfectly accurate as a definition), that parol evidence is admissible to explain a latent but not a patent ambiguity. There are cases which would seem rather to fall under the head of patent than of latent ambiguity, in which parol evidence has been held to be admissible. Judge Story, in the case of Peisch v. Dickson, 1 Mason's R. 9, after referring to the rule in regard to patent and latent ambiguity, says: "The difficulty lies not in the rule itself, but in applying it to particular cases, where the shades of distinction are very nice. There seems, indeed, to be an intermediate class of cases, partaking of the nature both of patent and latent ambiguities; and that is, where the words are all sensible, and have a settled meaning, but at the same time consistently admit of two interpretations, according to the subject-matter in the contemplation of the parties. In such a case I should think that parol evidence might be admitted, to

show the circumstances under which the contract was made, and the subject-matter to which the parties referred." The case of a note signed by one person for another (at least where it is doubtful on the face of the note which of the two is intended to be bound), would seem to be one of the intermediate class referred to by Judge Story, or to be governed by the same principle. The doubt in that case is whether the person who signed the note intended to bind himself or another; and that doubt may be perfectly removed by proof of the surrounding circumstances, in regard to which a court of construction may be placed, by parol evidence, as nearly as possible in the situation of the party whose written language is to be interpreted; the question being, what did the person thus circumstanced mean by the language he has employed? 1 Greenl. Ev., § 295. "The patent ambiguity of which Lord Bacon speaks," says the same author, "must be understood to be that which remains uncertain to the court after all the evidence of surrounding circumstances and collateral facts, which is admissible under the rules already stated, is exhausted." *Id.*, § 300. And "no judge is at liberty to pronounce an instrument ambiguous until he has brought to his aid, in its interpretation, all the lights afforded by the collateral facts and circumstances which, as we have shown, may be proved by parol."

"The language may be inaccurate," says Wigram, in his admirable treatise on the interpretation of wills, pp. 175-6, "but if the court can determine the meaning of this inaccurate language, without any other guide than a knowledge of the simple facts upon which, from the very nature of language in general, its meaning depends, the language, though inaccurate, cannot be ambiguous. The circumstance that the inaccuracy is apparent on the face of the instrument cannot in principle alter the case." It has been decided in several cases that where an ambiguity arises on the face of an instrument, whether the person signing it, or the person for whom it is given, was intended to be bound, parol evidence is admissible to remove the ambiguity. Mechanics' Bank of Alexandria v. The Bank of Columbia, 5 Wheat. R. 326, unanimously decided by the supreme court in 1820, is a leading American case on the subject, and expressly decides the question affirmatively. So does the case of Lazarus v. Shearer, 2 Ala. R. 718. In the case of Bradlee v. Boston Glass Co., 16 Pick. R. 347, before cited, parol evidence was introduced by the plaintiff without objection, and commented on by the learned chief justice, in delivering the opinion of the court. Indeed, we have seen no case in which parol evidence for such a purpose has been held to be inadmissible. The case of Stackpole v. Arnold, 11 Mass. R. 27, was much relied on by the counsel of the appellant in this case, to show that such evidence is inadmissible. In that case the name of the principal did not appear on the face of the note; and it is a familiar and well-settled principle that he cannot be bound in such case. The note on its face was plainly the note of the person

whose name was thereto signed, and of no other person; and to have admitted parol evidence to show that it was intended to be the note of another would have been directly contrary to the rule which declares such evidence inadmissible to contradict or vary a written contract. The great object of the judge, in his learned opinion in that case, was to show that this rule is not confined to specialties, or even contracts under the statute of frauds, but extends to all written contracts. Not one word is said in the whole opinion which indicates that parol evidence would be inadmissible where it is doubtful on the face of the instrument which of several persons was intended to be bound; but the contrary is indicated throughout the whole opinion. After laying down the general rule of exclusion of such evidence, on page 31, he adds: "Provided the contract is perfect in itself, and is capable of a clear and intelligible exposition from the terms of which it is composed." Again, on page 32, he says, that a "contract in writing, perfect in itself, and containing no ambiguity on the face of it incapable of explanation, cannot be enlarged or diminished by oral testimony." And on page 33, in speaking of the notes on which the suit was brought, he says, "they have no ambiguity upon the face of them," etc.

Secondly, as to the irrelevancy of the evidence in this case. There is perhaps no question of greater difficulty in the administration of justice than that which often arises in regard to the relevancy of evidence to the issue. "It is the duty of the court," says Philips, "to confine the evidence to the points in issue, that the attention of juries may not be distracted, nor the public time needlessly consumed; but in deciding that the evidence of any particular circumstance is not receivable upon this ground, the court must impliedly determine that no presumption to be drawn from that circumstance ought properly to have an effect upon the minds of the jury." It is obvious, therefore, that a great deal must necessarily be left to the discretion of the court of trial, in determining whether evidence is relevant to the issue or not. The question involved in the issue in this case was, why were the words "for Samuel H. Early" written at the foot of the note? Was it for the purpose of binding him as maker of the note, or merely for the purpose of indicating, as between him and Robert H. Early, that the note was given by the latter on the account and for the benefit of the former? As tending to throw light on this question, the plaintiffs proved that less than a month before the note was executed another note was given by the defendant, similar in all respects to that, except as to amount and payee, and in the omission of the brackets; and that the reason given by the defendant for adding the words "for Samuel H. Early," at the foot of the note, was "that in the case of the death of either his brother or himself, the note would show on what account or for whose benefit it was given." We are not prepared to say that this evidence did not tend to throw light on the question, and was irrelevant, supposing that there was

such ambiguity on the face of the note as to render parol evidence admissible on the principles before stated. We do not mean to deny the correctness of the cases cited from East and Peake by the counsel of the appellant (7 East 108; 5 Day's Esp. Peake Ca. 95), nor to contend that proof of one contract may be proof, by inference, of another. We mean only to say, in the language of Philips (edition of 1849, vol. I, p. 461), that "it may frequently be very proper, and in some cases absolutely necessary, to look beyond the transaction which is the immediate subject of inquiry, into previous transactions, for the purpose of making a just inference as to the knowledge of the parties, their motives or intention"; and to say, that this case, on the supposition above made, may come within that principle. The object of the evidence in such a case is not to set up a contract, but to remove an ambiguity apparent on the face of the contract. In the case before cited from 5 Wheat. 326, other transactions were proved; and a check executed about the same time, and in the same form (though upon a different bank) with that on which the suit was brought, was offered in evidence and held to be admissible.

But we have gone into the consideration of these two questions, in regard to the admissibility of parol evidence and the relevancy of the evidence in this case, not because it was necessary to decide them, but because they were discussed by the counsel, and are interesting questions, and we thought it might not be improper to express our views upon them. In this case we have already decided that the note upon its face was the note of Robert H. Early; and the plaintiffs, after introducing it, ought to have rested their case. The parol evidence offered by them to prove that the note was what it purported to be was unnecessary, and therefore improper. Without it the jury would have been compelled, under the instruction of the court, to have found a verdict for the plaintiffs. But should the judgment, on that ground, be reversed? For what purpose? To be remanded to the court below that the same verdict and judgment may be rendered on the note without the evidence? The public time may have been needlessly consumed by the introduction of the evidence in the court below, but can that time be regained by the consumption of more time in another trial? We therefore think, that even if parol evidence be inadmissible in such a case, and the evidence in this case was irrelevant, the judgment should not be reversed.

For these reasons we are affirming the judgment.

DANIEL, J.—This is quite a novel case, and I have experienced much difficulty in bringing my mind to a satisfactory judgment on the questions which it presents. My first impressions were, I must confess, strongly in favor of the views urged by the counsel of the plaintiff in error; but on more mature reflection I have felt constrained to concur in a judgment affirming that of the circuit court.

He who is sought to be charged with the performance of a written promise or engagement, made by himself in person, and endeavors to discharge himself of liability on the ground that his relation to the instrument is that of a mere agent for another, cannot complain of being subjected to a harsh requirement when held bound to maintain that the instrument does unequivocally disclose such relation. It is true that in the case of Key v. Parnham, 6 Harr. & John. 418, it is stated as a rule (and I have no doubt correctly), that "wherever, upon the face of an agreement a party contracting plainly appears to be acting as the agent of another, the stipulations of the contract are to be considered as operating solely to bind the principal, unless it manifestly appears by the terms of the instrument that the agent intended to superadd or substitute his own responsibility for that of his principal." Still the further rule asserted in the notes to the American leading cases, vol. I, p. 626, as fairly to be deduced from the decisions, is, I think, equally true, viz., that "in determining whether a party contracts personally or as agent, the presumption is in favor of the former; that is, a party will be bound personally, unless his character of agent be clearly disclosed."

Does the note on which this suit was brought show, by plain and unambiguous words or signs, that the plaintiff in error was acting as the mere agent of another in its execution? I think not. The fact that the note was a negotiable one, and the consideration that any recital about the relation of the parties in the body of the instrument might therefore be regarded as informal, made it the more incumbent on the plaintiff in error, if indeed he was acting as the agent of another, to manifest his character, plainly, in the signature. I do not think that he has done so.

It is conceded by the counsel for the plaintiff in error that, in the signature and affix thereto, the form most generally used to designate the execution of a note by an agent has been departed from; yet he has referred to several cases decided by the supreme court of Massachusetts, in which, where the form of disclosing the name of the agents and principals in the signature was (with the exception hereinafter to be noticed) like that employed here, the principals were held bound.

When the usual mode of signing a note by attorney is adopted, A B by C D, no room is left for doubt or construction. The inference is plain that the person who makes the note is performing a mere ministerial act in its execution. But where the note is signed, as it is in the case before us, "Robert H. Early, for Samuel H. Early," or, as in Long v. Colburn, 11 Mass. R. 96, "Pro. William Gill—J. S. Colburn," the intention of the parties is by no means so manifest. A doubt arises whether the person executing the note is acting as a mere agent, or is in fact giving his own note for and on account of the debt of another. In the case just above mentioned, and in other cases of a like character cited at the bar, counsel contended for

the latter construction; and though overruled, and as I think properly overruled by the court, still it must be conceded that the meaning of the parties is not, in such cases, wholly free from doubt.

The signature to the note here, however, is not simply "Robert H. Early, for Samuel H. Early." The only words on the face of the paper which could denote an agency, or disclose that Samuel H. Early was in anywise connected with the transaction ("for Samuel H. Early,") are included in marks or signs of parenthesis, which are generally used to indicate that the clause or words thus marked or included are not essential in the construction of the sentence. Has not the maker of the note thus given to the payee the privilege (as contended for by the defendant in error) to read the note as if the words "for Samuel H. Early" were not on it at all? Be this as it may, the construction in favor of a mere agency by Robert H. Early in the execution of the note was not so clear as to justify the court in withholding the note from the jury.

The evidence offered by the defendant in error, after the introduction of the note, was, I think, improperly received. The declaration of his purpose and intention in respect to another isolated note, and having no connection with the one in suit, made by Robert H. Early at the time of its execution, could not be properly resorted to as furnishing any evidence of what he intended by the language and course adopted by him in the execution of the note in controversy. Such testimony was wholly irrelevant.

I do not perceive, however, how the plaintiff in error could have been prejudiced by its introduction. Having rested his defense on the construction to be given to the paper, and the court having permitted it to go to the jury, their verdict against him, in the absence of any further testimony, must have followed as a necessary consequence. The production of further testimony by the defendant in error in aid of the construction given by the court could, in the state of the case, be of no benefit to himself or injury to his adversary. I regard the introduction of such testimony, therefore, under the circumstances, as merely idle, and, though improper, as furnishing no ground on which to found error.

I am for affirming the judgment, with costs to the appellee.[1]

[1] A note signed "A for B" or "A, agent for B," has been held to bind B, where A was authorized to execute the note. Roney's Adm'r v. Winter, 37 Ala. 277; Tiller v. Spradley, 39 Ga. 35.

"As the forms of words, in which contracts may be made and executed, are almost infinitely various, the test question is, whether the person signing professes and intends to bind himself, and adds the name of another, to indicate the capacity or trust in which he acts, or the person for whose account his promise is made; or whether the words referring to a principal are intended to indicate that he does a mere ministerial act, in giving effect and authenticity to the act, promise and contract of another. Does the person signing apply the executing hand as the instrument of another, or the promising and engaging mind of a contracting party?" Shaw, C. J., in Bradlee v. Boston Glass Manf., 16 Pick. (Mass.) 347, 350.

HITCHCOCK v. BUCHANAN.

1881. Supreme Court of the United States. 105 U. S. 416.

Submitted March 27, 1882. Decided April 10, 1882.

In error to the circuit court of the United States for the Southern District of Illinois.

Statement of the case by Mr. Justice Gray:

This was an action of assumpsit by the plaintiff as indorsee against William C. Buchanan and James C. Waugh as drawers of the following bill of exchange:

"Office of Belleville Nail Mill Co.:

$5,477.13 Belleville, Ill., December 15, 1875.

Four months after date, pay to the order of John Stevens, Jr., cashier, fifty-four hundred and seventy-seven 13-100 dollars, value received, and charge same to account of Belleville Nail Mill Co.

William C. Buchanan, President,
James C. Waugh, Secretary.

To J. H. Peiper, Treasurer, Belleville, Illinois."

The declaration alleged that the defendants, on the 15th of December, 1875, "at the office of Belleville Nail Mill Co., Belleville, Ill., made their certain bill of exchange" (describing it), and, after it had been accepted by the drawee, delivered it to the payee therein named, and he indorsed it to the plaintiff, and the bill at maturity was presented for payment, and payment refused, and the bill protested for non-payment, and the defendants, knowing that it would not be paid by the acceptor, had omitted to provide funds for its payment. A copy of the instrument above set forth, and of the acceptance and indorsement thereon, was filed with the declaration.

The defendants, after oyer craved and had, severally filed general demurrers to the declaration, which were sustained by the circuit court, and judgment given for the defendants, on the ground that the instrument declared on was the bill of exchange of the Belleville Nail Mill Company and not the bill of the defendants.

Mr. Justice Gray delivered the opinion of the court:

The bill of exchange declared on is manifestly the draft of the Belleville Nail Mill Company, and not of the individuals by whose hands it is subscribed. It purports to be made at the office of the company, and directs the drawee to charge the amount thereof to the account of the company, of which the signers describe themselves as president and secretary. An instrument bearing on its face all the signs of being the contract of the principal cannot be held to bind the agents personally. Sayre v. Nichols, 7 Cal. 535; Carpenter v. Farnsworth, 106 Mass. 561, and cases there cited.

The allegation in the declaration that the defendants made "their"

bill of exchange, is inconsistent with the terms of the writing sued on and made part of the record, and is not admitted by the demurrer. Dillon v. Barnard, 21 Wall. 430 [88 U. S., XXII. 635]; Pinz v. Tyler, 79 Ill. 248.

The provision of the statute of Illinois, ed. 1874, title Practice, §§ 34, 36, prohibiting defendants sued on written instruments from denying their signatures, except under plea verified by affidavit, has no application where the fact of signature is admitted by demurrer, and the only issue is one of law.[1]

SECOND NATIONAL BANK OF AKRON, OHIO, v. MIDLAND STEEL COMPANY.

1900. Supreme Court of Indiana. 155 Ind. 561

Dowling, C. J.—This case was transferred to this court by the order of the appellate court.

The appellant, an indorsee, sued the appellee upon a promissory note of which the following is a copy:

"Muncie, Ind., April 15, 1896.

"Midland Steel Company:

Three months after date we promise to pay to the order of the Monon Land Company $2,000, value received, negotiable and payable, without defalcation or discount at Union National Bank, Pittsburg, Pa., with interest at six per cent. per annum.

K. J. Beaty, President."

The complaint was in seven paragraphs. The first alleged, in general terms, that the appellee executed the note sued on. The second averred that the appellee executed the said note through one K. J. Beaty, who was at the time the president, general agent, and general manager of the appellee, and who, in executing the same acted by appellee's authority, and on its behalf, as such president, etc., and not personally; that the sole consideration of said note was a debt of $2,000 then due from and owing by the appellee, alone, to the Monon Land Company, which indorsed said note to the appellant. The third paragraph charged that the appellee executed said

[1] Chemung Canal Bank v. Judd, 141 Mass. 137.

"Where a party signs his name as cashier or agent for a banking, railroad or other corporation, in drawing drafts and bills, or in accepting drafts or other instruments of like character in its ordinary business, it appears on the face of the instrument that it is the obligation of the corporation, and the cashier or agent or other officer and authority to bind the corporation, he is not personally liable, as he may be shown by extrinsic evidence." Scott, J., in Commercial Bank v. Hall, 104 Mich. 494.

HITCHCOCK v. BUCHANAN.

(28) ... Circuit Court ... Decided April ..., 1882. 105 U. S. 416.

... Mayer ... Decided April 10, 1882.

... to the ... of the United States for the Southern District of Illinois.

... of ... Mr. Horace Gray:

... was an action ... by the plaintiff as indorsee against William C. Buchanan and James ... Waugh as drawers of the following bill of ...

"Form of ... Mill Co.'s ...

"$5427.13 ... December 15, 1875.

"Four ... after date ... to the order of John Stevens, Jr., cashier, ... and twenty-seven 13-100 dollars, value ..., and charge ... account of Belleville Nail Mill Co.

"... C. BUCHANAN, President.

"... C. WAUGH, Secretary.

"To J. H. ..., Belleville, Illinois."

... defendants, on the 15th of December, ... Belleville Nail Mill Co., Belleville, ..., made ... "change" (exchanging it), and, after ... delivered it to the payee therein named, ... plaintiff, and the bill at maturity ... payment refused, and the bill protested ... defendants, knowing that it would ... and omitted to provide funds for its ... above set forth, and of the acceptance ... was filed with the declaration.

... and had, severally filed pleas, which were sustained by the circuit ... for the defendants, on the ground ... the bill of exchange of the Belleville ... was the bill of the defendants.

... the opinion of the court.

... on is merely the draft of the ..., and not of the individuals by whose ... proceed to be made at the office of the ... drawers to charge the amount thereof to ... which the signers describe themselves ... instrument bearing on its face all the ... of the principal cannot be held to bind the ... Nichols, 7 Cal. 535; Carpenter v. Farnsworth, ... cited.

The ... the defendants made "their"

bill of exchange, is inconsistent with the terms of the writing sued on and made part of the record, and is not admitted by the demurrer. Dillon v. Barnard, 21 Wall. 430 [88 U. S., XXII 673]; Binz v. Tyler, 79 Ill. 248.

The provision of the statute of Illinois, ed. 1877, title Practice, §§ 34, 36, prohibiting defendants sued on written instruments from denying their signatures, except under plea verified by affidavit, has no application where the fact of signature is admitted by demurrer, and the only issue is one of law.[1]

SECOND NATIONAL BANK OF AKRON, OHIO, v. MIDLAND STEEL COMPANY.

1900. Supreme Court of Indiana. 155 Ind. 581.

Dowling, C. J.—This case was transferred to this court by the order of the appellate court.

The appellant, an indorsee, sued the appellee upon a promissory note of which the following is a copy:

"Muncie, Ind., April 13, 1896.

"Midland Steel Company:

Three months after date we promise to pay to the order of the Muncie Land Company $2,000, value received, negotiable and payable, without defalcation or discount, at Union National Bank, Pittsburg, Pa., with interest at six per cent. per annum.

R. J. Beatty, President."

The complaint was in seven paragraphs. The *first* alleged, in general terms, that the appellee executed the note sued on. The *second* averred that the appellee executed the said note through one R. J. Beatty, who was at the time the president, general agent, and general manager of the appellee, and who, in executing the note, acted by appellee's authority, and on its behalf, as such president, etc., and not personally; that the sole consideration of said note was a debt of $2,000 then due from and owing by the appellee, alone, to the Muncie Land Company, which indorsed said note to the appellant. The *third* paragraph charged that the appellee executed said

[1] Compare Chipman v. Foster, 119 Mass. 189.

"Where a party signs his name as cashier or agent for a banking, railroad or other corporation, in drawing drafts and bills, or in accepting drafts or other evidences of indebtedness, in its ordinary business, if it appears, or is made to appear, that it is the obligation of the corporation, and the cashier or agent or other officer had authority to bind the corporation, he is not personally liable, and the facts may be shown by extrinsic evidence." Scott, J., in Scanlan v. Keith, 102 Ill. 634, 642.

note by the name of R. J. Beatty, president. The *fourth* paragraph stated that the appellee had adopted and used as its name in the execution of negotiable promissory notes, etc., the name of R. J. Beatty, president, and by that name executed the note mentioned in the complaint. The allegation of the *fifth* paragraph was that the appellee executed the note under the name of R. J. Beatty, president, and that the note so executed was received, and accepted by the appellant as the note of the appellee. The *sixth* paragraph is the same as the *fifth* with the additional averments, however, that the note was executed for a debt due and owing from the appellee to the Muncie Land Company, and for no other consideration; that said note was executed by the appellee through one R. J. Beatty, who was at the time the president, general agent and general manager of the appellee, who acted by authority of the appellee, on its behalf, as its president, etc., and not personally; and that when the Muncie Land Company indorsed and delivered said note to appellant it notified appellant that said note was the note of the appellee executed under the name of R. J. Beatty, president, and that appellant received it as such note of the appellee, and not otherwise. The *seventh* paragraph avers that, on the day of the execution of the note sued on, and long prior thereto, the appellee had adopted and used in the execution of its notes, drafts, etc., the name of R. J. Beatty; that, on said day the appellee, by the description of "R. J. Beatty, president," executed to the Muncie Land Company the said note, whereby it, the said appellee, promised to pay said land company, three months thereafter, $2,000, with interest, etc., and that the Muncie Land Company received and accepted the same as the note of the appellee, and of no other person; that said note was given and executed for a debt of $2,000, owing from the appellee to the Muncie Land Company, and for no other consideration; that the said note was executed by the appellee, through one R. J. Beatty, who was the president, general agent, and general manager of the appellee, and who acted by the authority of the appellee and on its behalf in executing said note as such president, agent, etc., and not personally, or in any other capacity; that said Beatty intended to execute said note in such manner that it would be the note and obligation of the Midland Steel Company, and of no other person; that said Muncie Land Company accepted said note in the belief that it was the note and obligation of the appellee, and not the note of any other person, and that if said note is not the note of the said corporation such fact is due to the mutual mistake of the said R. J. Beatty and said Muncie Land Company; that the appellant accepted said note at the time it was indorsed to said appellant as the note and obligation of the appellee, and not otherwise, and that said note should, if found defective, be reformed so as to express the true intent of the parties.

Each paragraph avers the indorsement of the note by the Muncie Land Company to the appellant. It is also alleged that by the law of

the state of Pennsylvania, where the said note is payable, it is negotiable as bills of exchange are negotiable, and that no grace is allowed. A copy of the note is properly made an exhibit.

Prayer for judgment, the reformation of the instrument sued on, and all other proper relief. Demurrers to the several paragraphs of the complaint were sustained, and, the appellant refusing to plead further, judgment was rendered for appellee. The rulings on the demurrers are assigned for error.

Must the instrument set out in the complaint be conclusively presumed the personal obligation of R. J. Beatty, whose name is subscribed to it, or, under proper averments, may it be shown by parol evidence to be the contract of the appellee, the Midland Steel Company?

It is irregular in form, and ambiguous in its terms. The name of the Midland Steel Company is not subscribed to it, neither does the name of that corporation appear in the body of the contract. The instrument reads: "We promise to pay," etc., but the plural pronoun "we," in the first person, cannot properly be used by a corporation. The name of the company appears on the instrument above the line in which are written the place and date of execution.

The signature of the instrument is "R. J. Beatty, president." It is not stated of what corporation Mr. Beatty is president, or on whose behalf, or as whose agent he signs the paper. The words "we promise to pay" are not grammatically correct, if it is understood that Beatty is the sole promisor.

Men do not usually describe themselves as president, secretary, treasurer, trustee or agent, when signing their personal contracts by which they intend to bind themselves as individuals. If negotiable paper executed in this manner may be shown by proof of extrinsic circumstances to be the contract of a corporation, or of any unnamed principal, then it may be suggested that an indorsee of such instrument might be left in doubt as to the identity of his debtor. On the other hand, it may be said that if the description of the person signing the paper must be disregarded, and if the instrument is to be conclusively presumed the contract of the person whose name is subscribed to it, then, in many cases, the person so signing would find himself personally liable for the debt of another, while the holder of the instrument might discover in an action upon it that instead of having, as he supposed, the obligation of a solvent corporation or person, he held only the personal note of an irresponsible officer or agent of such corporation or person. In the usual course of business in this country, the addition of a title, or description of any kind is not customary—indeed, it may be said that such addition or description is *never* appended—when men sign their names to contracts by which they intend to bind themselves in their own proper persons, and not as the representatives of another. Again, it is to be observed that such additions and descriptions as president, secretary, treasurer,

trustee, agent, and the like, plainly import a relation to some other person, as a principal, distinct from the person subscribing the instrument. Besides, the appearance of such description of the party signing the instrument is sufficient, in fact, to apprise the other party that the person so signing his name and describing himself, is not the principal in the transaction, but, that another, disclosed or undisclosed, is the real party in interest; or, at least, such addition or description is sufficient, in fact, to put the other party upon inquiry, both as to the identity of the real principal and the authority of the agent to bind him. We do not mean to assert here, however, the sufficiency in law of every such indication that the paper is executed in a representative capacity only.

The decisions in this state upon the question presented here cannot easily be reconciled or distinguished. Among those holding that extrinsic evidence is not admissible to show that a contract executed by one who adds to his signature the words president, secretary, agent, trustee, etc., is not the contract of the person so signing, but the obligation of another party, are the following: Prather v. Ross, 17 Ind. 495; Kendall v. Morton, 21 Ind. 205; Wiley v. Shank, 4 Blackf. 420; Mears v. Graham, 8 Blackf. 144; Hays v. Crutcher, 54 Ind. 260; Williams v. Second Nat. Bank, 83 Ind. 237; Willson v. Nicholson, 61 Ind. 241; Hayes v. Brubaker, 65 Ind. 27; Avery v. Dougherty, 102 Ind. 443; Hobbs v. Cowden, 20 Ind. 310; Jackson School Tp. v. Farlow, 75 Ind. 118, 123.

A different view seems to have been taken in other cases. Means v. Swormstedt, 32 Ind. 87; McHenry v. Duffield, 7 Blackf. 41; Pitman v. Kintner, 5 Blackf. 250, 33 Am. Dec. 330; Kenyon v. Williams, 19 Ind. 44; Bingham v. Kimball, 17 Ind. 396; Indiana, etc., R. Co. v. Davis, 20 Ind. 6; Gaff v. Theis, 33 Ind. 307; Vater v. Lewis, 36 Ind. 288; Pearse v. Welborn, 42 Ind. 331; Neptune, Adm'r, v. Paxton, Rec., 15 Ind. App. 284; Louisville, etc., R. Co. v. Caldwell, 98 Ind. 245; Second Baptist Church v. Furber, 109 Ind. 492, 496; Swarts v. Cohen, 11 Ind. App. 20; Hunt v. Listenberger, 14 Ind. App. 320.

In reviewing the cases in this state, it will be observed that the court, while adhering to the rule that the words affixed to the names of the persons signing an instrument are to be treated as mere *descriptio personarum*, deprecates the doctrine as an unreasonable one, and holds, whenever possible, that when the contract itself shows that the words were not merely descriptive of the person, they will not be so regarded.

Many exceptions to the rule contended for by the appellee in this case are generally recognized.

It does not apply to contracts executed by public officers in the discharge of official duties. 1 Am. & Eng. Ency. Law (2nd ed.) 1056, and cases cited in note 2; Macbeath v. Haldimand, 1 Durn. & East 172; Sparta School Tp. v. Mendell, 138 Ind. 188. Nor to instru-

ments executed by bank officers on behalf of a bank. Bank of State v. Wheeler, 21 Ind. 90; Board, etc., v. Butterworth, 17 Ind. 129; Baldwin v. Bank of Newbury, 1 Wall. 234, 17 L. ed. 534; Nave v. First Nat. Bank, 87 Ind. 204; Commercial Bank v. French, 21 Pick. (Mass.) 486, 32 Am. Dec. 280; Watervliet Bank v. White, 1 Denio (N. Y.) 608; Houghton v. First Nat. Bank, 26 Wis. 663. Nor to simple contracts for the performance of agreements other than the payment of money. Deming v. Bullitt, 1 Blackf. 241; Avery v. Dougherty, 102 Ind. 443, 52 Am. Rep. 680; Whitney v. Wyman, 101 U. S. 392, 25 L. ed. 1050; Post v. Pearson, 108 U. S. 418, 27 L. ed. 774.

It is said by Mr. Freeman in his note upon Greenburg v. Whitcomb Lumber Co., 90 Wis. 225, 63 N. W. 93, 28 L. R. A. 439, 48 Am. St. 911, on p. 919, that, "Upon principle, the true question for consideration in every case is, or, at least, ought to be, whether, taking the writing as a whole, it sufficiently appears therefrom that it is intended to be binding upon the corporation rather than upon the agent who has signed it. It is not at all usual for a person, executing a note or other contract, to add words descriptive of himself, or to refer to his relation to other persons, whether natural or artificial, who have no connection with the transaction, and, when he designates his representative capacity, to assume that such designation was intended merely as a description of himself is to assume something which is rarely, and perhaps never, in harmony with the facts. Of course, if he only describes himself as an agent or officer without indicating who his principal is, the instrument must necessarily be accepted as the obligation of the agent, or treated as void for want of a designated obligor. If, on the other hand, he, upon the face of the writing, discloses not only that he is an agent or officer, but also of whom he is such agent or officer, we must be astute to misapprehend, or else we must concede that he has employed language better calculated to evidence the obligation of his principal than of himself. There is a growing inclination to consider an instrument as it would manifestly be understood by the average business man, or, in other words, as it was most probably understood by the party receiving and the party signing it, and to exonerate the latter from liability when, according to such construction it appears to the court that he did not intend, and was not understood, to bind himself, but to act for the corporation of which he was the authorized agent. Despatch, etc., Co. v. Bellamy, etc., Co., 12 N. H. 215, 37 Am. Dec. 203; Magill v. Hinsdale, 6 Conn. 464, 16 Am. Dec. 70; Smith v. Alexander, 31 Mo. 193; McClellan v. Reynolds, 49 Mo. 312; Pratt v. Beaupre, 13 Minn. 187; Johnson v. Smith, 21 Conn. 627; Wyman v. Gray, 7 Harr. & J. 409; Means v. Swormstedt, 32 Ind. 87, 2 Am. Rep. 330; Vater v. Lewis, 36 Ind. 288, 10 Am. Rep. 29; Farmers', etc., Bank v. Colby, 64 Cal. 352, 28 Pac. 118." See also the very clear and full state-

ment of the modern doctrine on this subject in 4 Thomp. on Corp., § 5141 *et seq.*

In Carpenter v. Farnsworth, 106 Mass. 561, 8 Am. Rep. 360, a check had "Aetna Mills" printed on the margin, was signed "T. D. F., Treas.," and was given for the debt of the mills. It was held not to bind F. personally. Gray, J., "The court has always laid hold of any indication on the face of the paper, however informally expressed, to enable it to carry out the intention of the parties."

In Roberts v. Austin, 5 Wharton (Pa.) 313, the action was brought by the payee against the drawer of a bill of exchange, signed by the latter in his own name merely. Parol evidence was admitted to show that the drawer was agent of the drawee, and had given the bill in the business of the latter, and that the payee knew the facts when he received the bill.

In Moore v. McClure, 8 Hun 557, parol evidence was held admissible to charge the principal on a note signed "A. B., Agent." The court said: "The fact that the name of the principal does not appear on the face of the note is not, under the modern decisions in this state, at all conclusive. If it was intended to be given in the business of the principal, was in fact so given, and with due authority, it is binding on the principal, and all this is matter of evidence."

In Hicks v. Hinde, 9 Barb. 528, a draft in favor of the plaintiff was signed "John Hinde, Agent," and extrinsic evidence was admitted to discharge Hinde from liability.

In Scanlan v. Keith, 102 Ill. 634, 40 Am. Rep. 624, the court says: "Where a party signs his name as cashier or agent for a banking, railroad or other corporation, in drawing drafts or bills, or in accepting drafts or other evidences of indebtedness, in its ordinary business, if it appears, or is made to appear, it is the obligation of the corporation, and the cashier or agent or other officer had authority to bind the corporation, he is not personally liable, and the facts may be shown by extrinsic evidence." See, also, Hypes v. Griffin, 89 Ill. 134, 31 Am. Rep. 71; Merchants' Bank v. Central Bank, 1 Ga. 418, 44 Am. Dec. 665.

In Baldwin v. Bank of Newbury, 1 Wall. 234, 17 L. ed. 534, the court, by Clifford, J., quote with approbation the opinion of Johnson, J., in Mechanics' Bank v. Bank of Columbia, 5 Wheat. 326, 5 L. ed. 100, in which it was said: "It is by no means true, as was contended in argument, that the acts of agents derive their validity from professing, on the face of them, to have been done in the exercise of their agency." Rules of form, in certain cases, have been prescribed by law, and where that is so, those rules must in general be followed, but in the diversified duties of a general agent, the liability of the principal depends upon the fact that the act was done in the exercise and within the limits of the powers delegated, and those powers are necessarily inquirable into by the court and jury. Maker of the note in that case had signed his name without any addition to

indicate his agency, which makes the case a stronger one than the one under consideration. Same rule as applied to ordinary simple contracts has since that time been fully adopted by this court. Examples of the kind are to be found in the case of the New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How. 381, 12 L. ed. 465, and in the more recent case of Ford v. Williams, 21 How. 289, 16 L. ed. 36, where the opinion was given by Mr. Justice Grier. In the latter case it is said that the contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein. Parol proof may be admitted to show the real nature of the transaction, and it is there held that the admission of such proof does not contradict the instrument, but only explains the transaction."

"Where the principal's name appears printed in the margin or head of a bill or note executed by an agent, the former is sufficiently designated to put a prudent man upon enquiry, and to take the case out of the rule in regard to an undisclosed principal." 1 Am. & Eng. Ency. Law (2nd ed.) 1047, and cases cited in notes.

In the case before us, the Midland Steel Company is named in the instrument sued on. There is nothing to indicate that the name of the company is outside of the note, or that it was not written in and intended to form a part of it. The complaint avers that the note was given by the Midland Steel Company, and, in some of its paragraphs that it was given for a debt owing by the Midland Steel Company to the Midland Land Company, and for no other consideration; that it was intended to be the note of the appellee, and was so received, and that the appellant took it from the payee with that understanding. Under these circumstances we think it may properly be treated as the note of the Midland Steel Company, and not as the obligation of the person who signed his name to it, as the president of that corporation. In view of the fact that an endorsee is seeking to charge the Midland Steel Company as the maker, and, as the endorsee alleges, that it took the note with notice that Beatty, whose name was subscribed to it as president, was not bound, we think it unimportant whether the note was negotiable as a bill of exchange or otherwise. If the appellee is correct in its contention that the instrument was not negotiable as a bill of exchange, then it was a simple contract for the payment of money and, according to the authorities, the rule as to the admissibility of parol evidence to explain its true character is less stringent. It is also a fact of some importance in the case that the party attempting to escape liability is the one who is alleged to be the real debtor, and who received the full consideration for which the note was executed, and not the officer or agent who undertook to execute it in his representative capacity and who derived no personal benefit from the transaction.

The form of the instrument sued on is not such as to require the court to presume, conclusively, that it is the obligation of R. J. Beatty. Extrinsic evidence is admissible to explain the instrument,

and to show that it was intended and understood by the parties to be the note of the Midland Steel Company.

The averments of each paragraph of the complaint were sufficient to authorize such proof, and to fix the liability intended to be created by the instrument where it properly and justly belongs. The previous decisions of this court inconsistent with the views expressed in this opinion are overruled.

The judgment is reversed, with instructions to the court to overrule the demurrers to the several paragraphs of the complaint, and for further proceedings in accordance with this opinion.[1]

[1] Where the agent's name alone is signed to a negotiable instrument, and nothing appears in the body of the instrument to indicate that any other person is to be bound, it is generally held that parol evidence is inadmissible to show that the note was made by the agent for a principal. Bartlett v. Hawley, 120 Mass. 92; Wing v. Glick, 56 Iowa 473; Hayes v. Matthews, 63 Ind. 412; Williams v. Bank of Lafayette, 83 Ind. 237. In Sturdivant v. Hull, 59 Me. 172, a note signed "John T. Hull, Treas. St. Paul's Parish," was held to be the personal obligation of Hull. The court decided that evidence to show that Hull made the note on behalf of and for the sole benefit of the parish had been properly excluded. On page 174, Barrows, J., said: "When a man has deliberately said in writing, 'I promise to pay,' and a valid consideration for the promise is shown, right and justice are not very likely to be gainers by allowing him to retract and to undertake to prove that he did not actually mean 'I promise,' but that he meant and the other party understood that he meant, that some third party, whose promise the writing does not purport to be, undertook the payment." Compare with this case, Shoe, etc., Bank v. Dix, 123 Mass. 148. There is stronger reason for excluding parol evidence when the action on the note is brought by a holder in due course. See Casco Nat. Bank v. Clark, 139 N. Y. 307.

Where the instrument is ambiguous, the tendency of the more modern decisions is to allow the admission of parol evidence to show the intent of the parties. See collection of cases, Reinhard on Agency, § 216. In Hardy v. Pilcher, 57 Miss. 18, Chalmers, J., said: "Ordinarily no extrinsic testimony of any kind is admissible to vary or explain negotiable instruments. Such paper speaks its own language, and the meaning which the law affixes to it cannot be changed by any evidence *aliunde*. One of the few exceptions to the rule is, where anything on the face of the paper suggests a doubt as to the party bound, or the character in which any of the signers has acted in affixing his name, in which case testimony may be admitted between the original parties to show the true intent." See also Laflin, etc., Co. v. Sinsheimer, 48 Md. 411, in which Robinson, J., said: "Parol evidence in such cases does not contradict, alter, or add to the written instrument, but explains the intention of the parties, which could not be ascertained with any degree of certainty from the face of the instrument itself."

See collection of cases and statement of rule in Mechem on Agency, §§ 441–443.

(c) SIMILAR CONTRACTS.

THOMSON v. CHOUTEAU AND VALLE.

1854. Supreme Court of Missouri. 19 Mo. 98.

James Napton delivered the opinion of the court.

The special agreement upon which this action of assumpsit is based was executed by the parties in discharge of a previous agreement signed by "J. P. V. Thompson and A. Shiff, for Jacob M. Clark."

The substitute agreement relates to the same subject-matters and is signed by "A. Shiff, by his agents Choteau & Valle and J. P. V. Thompson." In this last agreement Thompson "agrees to furnish not exceeding 12,500 bushels of good, merchantable corn to said Shiff, to be paid for at the rate of 40 cents per bushel or 50 pounds," and the said Shiff also in full of the written contract agrees to receive not exceeding the said 12,500 bushels of corn, and to pay therefor at the rate of 40 cents per bushel, clear of all outlines, payment to be made at St. Louis, to Choteau & Valle, and the corn to be shipped to Choteau & Valle, at St. Louis, by said Thomson, within the ensuing month, to be at Shiff's risk and expense when on board the steamboat. The declaration avers the delivery of the corn, and that by the agreement the defendants, Choteau & Valle, were bound to pay the six thousand dollars. The only question for our determination is, whether the contract, as set out, bound the defendants.

The general principles which regulate the liabilities of principal and agent are not disputed. Where the agent acts in the name of his principal the agent is not liable. *Patterson v. Cecil*, 15 Mo. 162. But the rule has its exceptions; it does not apply when the principal is unknown to the party dealing with the agent; nor where there is no responsible principal to resort to; nor where the agent makes the undertaking his own.

The only question in this case is whether the agent has made the contract his own. The contract is set out in *haec verba* in the declaration, and its question in relation to the principal being a foreigner, or unknown, or irresponsible, are presented by the case. The written contract done is relied on.

Can there be any doubt that Shiff, the principal, was bound by the contract? It is executed in his name, and signed by his agents for him in precisely the form directed by the law, when the agent intends to bind the principal. Spencer v. Field, 10 Wend. 87. Thompson agrees to deliver the corn to Shiff, and Shiff agrees to pay for it at the rate of 40 cents per bushel. It is true that the payment is to be made at St. Louis, and by Choteau & Valle, but this seems to be a mere designation of the place and mode of payment. Choteau & Valle have not got to bind themselves to anything. Their names are not in the instrument except as agents. It is Shiff's con-

and to show that it was intended and understood by the parties to be
the note of the Midland Steel Company.

The averments of such paragraph of the complaint were sufficient
to authorize such proofs and to [illegible] intended to be created
by the instrument, whose it purports and really belongs. The pre-
[illegible] with the views expressed in
this opinion are overruled.

The judgment is reversed, with instructions to the court to overrule
the demurrers to the second and third paragraphs of the complaint, and for
further proceedings in accordance with this opinion.[1]

Where the [illegible] appears to be executed in a negotiable instrument, and
nothing appears on the [illegible] agreement to indicate that any other per-
son is to be liable, [illegible] held that parol evidence is inadmissible to
show that the [illegible] agent for a principal. Bartlett v. Hawley,
120 Mass. 429, 21 Am. R. 533; Stanton v. Stanton, 93 Ind. 412;
Williams [illegible] Ind. 497; Southard v. Hall, 30 Me.
172; [illegible] Texas St. Paul Ry. Co.," was held to be the
[illegible] court decided that evidence to show that
Hall made [illegible] note for the use and benefit of the parish had
[illegible] 174, Barrows, J., said: "When a man has
[illegible] promise to pay, and a valid consideration for
[illegible] and parties are not very likely to be misled by
[illegible] to undertake to prove that he did not actually
[illegible] parties and the other party understood that he
[illegible] whose promise the writing does not purport to
[illegible]." Compare with this case Slee, etc., Bank v. Dix,
[illegible] reasons for excluding parol evidence when
[illegible] is prompted by a holder in due course. See Cases Nat.
[illegible] v. Ayer.

[illegible] statement is sometimes the tendency of the more modern deci-
[illegible] admission of parol evidence to show the intent of the
[illegible] execution of [illegible] Reinhard on Agency § 216. In Hardy v.
[illegible] Mut. Of Chelsea, [illegible] "Ordinarily no extrinsic testimony
of [illegible] is admissible to vary or explain executed instruments. Such
[illegible] and language, and the meaning which the law affixes to it
[illegible] by any evidence aliunde. One of the few exceptions to the
rule is [illegible] anything on the face of the paper suggests a doubt as to the
[illegible] to the character in which any of the signers has acted in affixing
[illegible] which case testimony may be admitted between the original par-
[illegible] Sec also Bailey, etc., Co. v. Sternheimer, 48 Md
[illegible] Such evidence in such cases does not con-
[illegible] but explains the intention of
[illegible] which could not be ascertained with any degree of certainty from
[illegible]

[illegible] Rule in Mechem on Agency, §§ 441–

(c) SIMPLE CONTRACTS.

THOMPSON v. CHOUTEAU AND VALLE.

1849. SUPREME COURT OF MISSOURI. 12 Mo. 488.

JUDGE NAPTON delivered the opinion of the court.

The special agreement upon which this action of assumpsit is based was executed by the parties in discharge of a previous agreement signed by "J. T. V. Thompson and A. Shiff, for Jacob M. Ober."

The substitute agreement relates to the same subject-matter, and is signed by "A. Shiff, by his agents, Choteau & Valle and J. T. V. Thompson." In this last agreement Thompson "agrees to furnish not exceeding 12,500 bushels of good, merchantable corn to said Shiff, to be paid for at the rate of 40 cents per bushel of 56 pounds, and the said Shiff also, in full of the written contract, agrees to receive not exceeding the said 12,500 bushels of corn, and to pay therefor at the rate of 40 cents per bushel, clear of all charges, payment to be made at St. Louis, by Choteau & Valle, and the corn to be shipped to Choteau & Valle, at St. Louis, by said Thompson, within the ensuing month, to be at Shiff's risk and expense when on board the steamboat. The declaration avers the delivery of the corn, and that by the agreement the defendants, Choteau & Valle, were bound to pay the six thousand dollars. The only question for our determination is, whether the contract, as set out, bound the defendants.

The general principles which regulate the liabilities of principal and agent are not disputed. Where the agent acts in the name of his principal the agent is not liable. Patterson v. Gaud, 15 East. 162. But this rule has its exceptions; it does not apply when the principal is unknown to the party dealing with the agent; nor where there is no responsible principal to resort to; nor where the agent makes the undertaking his own.

The only question in this case is whether the agent has made the contract his own. The contract is set out in *pace verba* in the declaration, and no question in relation to the principal being a foreigner, or unknown, or irresponsible, are presented by the case. The written contract alone is relied on.

Can there be any doubt that Shiff, the principal, was bound by this contract? It is executed in his name, and signed by his agents for him in precisely that form directed by the law, when the agent intends to bind the principal. Spencer v. Field, 10 Wend. 87. Thompson agrees to deliver the corn to Shiff, and Shiff agrees to pay for it at the rate of 40 cents per bushel. It is true that this payment is to be made at St. Louis, and by Choteau & Valle, but that seems to be a mere designation of the place and mode of payment. Choteau & Valle take care not to bind themselves to anything. Their names are not to the instrument except as agents. It is Shiff's con-

tract to pay, through Choteau & Valle; not the contract of Choteau & Valle. It does not appear upon the face of the writing that Choteau & Valle have made any contract with the plaintiff. They have merely executed a contract for Shiff, their principal, and executed it in the name of their principal, so as to bind him and not them. What facts may exist outside of the instrument of writing which might subject them to responsibility, cannot be considered in this case. No such facts are alleged in the declaration. Judgment affirmed.[1]

OFFUTT v. AYRES.

1828. Court of Appeals of Kentucky. 7 T. B. Mon. 356.

Opinion of the court by Judge Mills.

This is a summons and petition against Benjamin Ayres, on the following note:

"On the twenty-fifth day of December, eighteen hundred and twenty-five, I promise to pay S. Offutt one hundred and fourteen dollars, for the hire of Harry. For B. Ayres,
Lex., Feb. 28, 1825. W. B. Ayres."

There was a demurrer to the petition, and that demurrer was sustained by the court below, and judgment rendered for the defendant, from which the plaintiff has appealed.

The question is, is this note to be taken on its face as the note of B. Ayres, or W. B. Ayres? If of the former, the judgment is wrong; if the latter, the judgment is right.

Whether W. B. Ayres was or was not the agent of B. Ayres is not material. If he was not the agent, then there could be no question that he alone is bound in the note. If he was the agent, it was competent for him to interpose his own credit and deal upon it, while dealing for his principal; and the question then turns upon the meaning of the instrument. On whom does it impose the obligation, on the principal or the agent?

Upon the letter of the instrument there can be no doubt. According to its grammatical import, it is the undertaking of W. B. Ayres. His signature to the note is in the same case, with the pronoun "I," which precedes; and "I" is nominative to the very "promise." Transpose the words as we please, the same meaning follows their letter. If the note read, "I, W. B. Ayres, promise to pay for B. Ayres," the sense would have been so striking that there could not have been any dispute, without violence to the letter; and yet the order in which the words are placed leaves the sense the same, and places every noun

[1] *Accord:* Thilmany v. Iowa Paper-Bag Co., 108 Ia. 357.

[illegible] ex rel. [illegible] v. [illegible] and the complaint of Chateau & Valle. It does not appear upon the face of the proceedings that Chateau & Valle were made parties to the [illegible]. They were [illegible] a decree [illegible] and executed as the agent of [illegible] to bind him and not them. [illegible] the statement of writing which [illegible] cannot be considered in this case. No such [illegible] in the declaration. Judgment reversed.

[illegible] v. AYRES.

[illegible] Term, 1838. [illegible] Error to [illegible]. [7 Ala. Rep. 350.

Opinion of Chief Justice Ormond.

This is a motion and petition against Paramore Ayres, on the following note:

"On the [illegible] day of December eighteen hundred and [illegible] after date I promise to pay [illegible] one hundred and fourteen dollars for [illegible]. For B. Ayres.
Test, Feb. [illegible] W. B. Ayres."

There was a demurrer to the petition, and that demurrer was sustained by the [illegible] and judgment rendered for the defendant. [illegible] error.

The question [illegible] to be taken on the face as the note of B. Ayres, or W. B. Ayres. If the former, the judgment is wrong; if the latter, it is correct.

Whether W. B. Ayres [illegible] was the agent of B. Ayres is not material. If not the agent, such there could be no question that he [illegible]. If he was the agent, it was competent for him to execute his own credit and deal upon it, while acting as the principal; but the question then turns upon the meaning of the instrument. On whom does it impose the obligation, as the principal or the agent?

Upon the face of the instrument there can be no doubt. According to the grammatical construction of the sentence, the pronoun "I," [illegible] and "I" is nominative to the verb "promise." Transposing the words so as to express the same meaning, follows their letter. It was evidently "I, W. B. Ayres, promise to pay for B. Ayres," the [illegible] to be [illegible]. Had there been any [illegible] there could not have been any difficulty in the order [illegible], and on the order in which the words are used [illegible] the sense and places every noun

[illegible] Term, 1838. [illegible] Error to [illegible].

and verb in the same case and mode and tense in which they would stand in the way supposed. The position only makes the sentence a little more obscure.

It may be said that the note is an inaccurate way of executing an authority, and that it is so customary as to demand of the court a construction of the words different from their proper meaning. It is true that instances may be found where the meaning of a word is changed by its popular use, so far from the proper sense that, to effectuate the intention of the parties in the use of it, courts have adopted the popular acceptation. But this doctrine ought not to be carried to the extent of changing grammatical construction, and transposing nominatives, and placing one case of nouns for another. To do this, it is necessary to aver and prove mistake or fraud, in order to change the instrument itself. Until this is done, he who has undertaken, or "promised," must be left bound by that undertaking or promise; and it would be erroneous to release him from the literal and proper meaning of his undertaking.

With this accords the case of McBean v. Morrison, 1 Marsh. 545, and Duval v. Craig, 2 Wheat. 56-57.

The judgment, the chief justice dissenting, must be affirmed, with costs.

Bibb, Ch. J.—(Dissenting.)

Offutt sued by petition and summons, and "states that he holds a note on the defendant, Benjamin Ayres, in substance as followeth: On the 25th of December, 1825, I promise to pay S. Offutt one hundred and fourteen dollars, for the hire of Harry. For B. Ayres,

Lexington, February 28, 1825. W. B. Ayres.

Test, Ezra Offutt.

Yet said debt remains unpaid," etc.

The defendant demurred. The court gave judgment for defendant.

Upon the face of the writing, it seems to me to be the note of B. Ayres, executed for him by his agent, W. B. Ayres. That such is the genuine, unadulterated meaning of the instrument, my mind perceives as clearly as it is capable of understanding any proposition. This mode of executing a note for the principal by his agent is plain, compendious, and, from its artless simplicity and clearness, is convenient and in common use. That the writing was intended to signify, and does signify, a promise by B. Ayres, by his note of hand, executed for him by W. B. Ayres, as his agent, is, to my mind, a self-evident truth, to be understood at once by inspection. Nor do I deem it necessary to call in anything more by way of confirmation of a proposition so plain to my view.

The petition states it to be the note of Benjamin Ayres; he has not denied the authority of W. B. Ayres to act for him in that behalf; the demurrer admits the statement in the petition, that it is the note of Benjamin Ayres. If by plea Benjamin Ayres had denied that the

note was his act, then, to have charged him, it would have been necessary to prove the authority of W. B. Ayres. The demurrer does not question the authority of W. B. Ayres to act for Benjamin. But if W. B. Ayres had falsely assumed an agency, when in truth he had not authority to bind Benjamin, then W. B. Ayres would have been personally responsible; not by reason of this or that form by which he called himself agent, but upon the general principle that every one becomes personally responsible for falsely asserting an authority and acting on behalf of another, when in truth and in fact he had not the lawful authority so to act in the name of that other.

My opinion is that the judgment should have been for the plaintiff, Offutt.[1]

HIGGINS v. SENIOR.

1841. Court of Exchequer. 8 M. & W. 834.

Parke, B.—The question in this case, which was argued before us (a) in the course of the last term, may be stated to be, whether in an action on an agreement in writing, purporting on the face of it to be made by the defendant, and subscribed by him, for the sale and delivery by him of goods above the value of £10, it is competent for the defendant to discharge himself, on an issue on the plea of non assumpsit, by proving that the agreement was really made by him by the authority of and as agent for a third person, and that the plaintiff knew those facts at the time when the agreement was made and signed. Upon consideration, we think that it was not, and that the rule for a new trial must be discharged.

There is no doubt that where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to (b), and charge with liability on the other (c), the unnamed principals; and this, whether the agreement be or be not required to be in writing by the statute of frauds: and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind, but shows that it also binds another, by reason that the act of the agent, in signing the agreement in pursuance of his authority, is in law the act of the principal.

But, on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contract-

[1] *Accord:* Crutcher v. M. & C. R. R., 38 Ala. 579.
Contra: King v. Handy, 2 Ill. App. 212; Ford v. Dist. of Stuart, 46 Ia. 294; McCall v. Clayton, 44 N. Car. 422.

ing party, is not such, would be to allow parol evidence to contradict the written agreement, which cannot be done. And this view of the law accords with the decisions, not merely as to bills of exchange (d) signed by a person, without stating his agency on the face of the bill, but as to other written contracts, namely, the cases of Jones v. Littledale, 6 Ad. & Ell. 486, 1 Nev. & A. 677, and Magee v. Atkinson, 2 M. & W. 440. It is true that the case of Jones v. Littledale might be supported on the ground that the agent really intended to contract as principal; but Lord Denman, in delivering the judgment of the court, lays down this as a general proposition, "that if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility." And this is also laid down in Story on Agency, §269. Magee v. Atkinson is a direct authority, and cannot be distinguished from this case.

The case of Wilson v. Hart, 7 Taunt. 295, 1 Moore 45, which was cited on the other side, is clearly distinguishable. The contract in writing was, on the face of it, with another person, named Read, appearing to be the principal buyer; but there being evidence that the defendant fraudulently put forward Read as the buyer, whom he knew to be insolvent, in order to pay a debt from Read to himself with the goods purchased, and having subsequently got possession of them, it was held, on the principle of Hill v. Perrott, 3 Taunt. 274, and other cases, that the defendant was liable, and as is observed by Mr. Smith, in the very able work to which we were referred (Leading Cases, Vol. 2, p. 125), that decision turned altogether upon the fraud, and if it had not, it would have been an authority for the admission of parol evidence to charge the defendant, not to discharge Read.

Rule discharged.[1]

PRATT v. BEAUPRE.

1868. Supreme Court of Minnesota. 13 Minn. 187.

McMillan, J.—This action is brought by the plaintiff to recover damages for an alleged breach of a contract to transport and deliver certain flour. The contract is in the following words:

"Saint Paul, May 6, 1863.

"We, Temple & Beaupre, of Saint Paul, Ramsey County, Minnesota, for the consideration of twenty-five dollars to us in hand paid, the receipt whereof is hereby acknowledged, have bargained, agreed

[1] For discussion of English and American rules see Barbre v. Goodale, 28 Ore. 465, 470.

and contracted with B. F. Pratt, of Saint Peter, to receive at his mill in Saint Peter, county of Nicollet, state aforesaid, one thousand and four hundred barrels (1,400) of flour, and transport the same and deliver to Capt. M. P. Small, commissary of subsistence for the United States, on the levee in Saint Paul, at such time as he, the said Small, shall direct, for the sum of twenty-five cents for each barrel so transported and delivered in good order.

(Signed) TEMPLE & BEAUPRE,
B. F. PRATT. Agents steamer *Flora.*"

The words "agents steamer *Flora,*" attached to the signature of Temple & Beaupre, are *descriptio personarum.* The rule is that when words which may be either descriptive of the person, or indicative of the character in which a person contracts, are affixed to the name of a contracting party, *prima facie,* they are descriptive of the person only; but the fact that they were not intended by the parties as descriptive of the person, but were understood as determining the character in which the party contracted, may be shown by extrinsic evidence, but the burden of proof rests upon the party seeking to change the *prima facie* character of the contract. And when a party who thus seeks to change the *prima facie* character of the contract, does so on the ground of agency in making the contract, the fact of his agency must be established; for if he acted as an agent without authority, he is personally liable. On the trial of this cause, the only evidence was the deposition on the part of the plaintiff. The defendant offered no evidence. There is no evidence to establish the *fact* of the agency of Temple & Beaupre. In the absence of evidence to prove that fact, those portions of the deposition of the plaintiff indicated by the letters a, b, and c, respectively, although under other circumstances they might be competent as evidence tending to show that the plaintiff contracted with them as agents, are not material. They were, therefore, properly stricken out. This determines the only point raised by the defendant's counsel.

The judgment below is affirmed.[1]

[1] In Prather v. Ross, 17 Ind. 495, Davison, J., quoted with approval the following passage from Story on Agency: "In order to bind the principal and make it his contract, the instrument must purport, on its face, to be the contract of the principal, and his name must be inserted in it, and not merely the name of the agent, even though the latter be described as agent in the instrument."

"Where the question of agency in making a contract arises there is a broad line of distinction between instruments under seal and stipulations in writing not under seal, or by parol. In the former case the contract must be in the name of the principal, must be under seal, and must purport to be his deed and not the deed of the agent covenanting for him. In the latter case the question is always one of intent; and the court, being untrammelled by any other consideration, is bound to give it effect. As the meaning of the law-maker is the law, so the meaning of the contracting parties is the agreement. Words are merely the symbols they employ to manifest their purpose that it may be car-

and into execution. If the contract be unsealed and the meaning clear, it matters not how it is phrased nor does it signify whether by the agent for the principal or with the name of the principal by the agent or otherwise. The intent developed is alone material, and when that is ascertained it is conclusive." Gaynor, J., in Wormser v. Adams, 101 N. Y. 452, 455. The above passage was quoted with approval by Fuller, J., in Bloom v. Tomlinson, 45 Sup. Ct. 151, 153.

and contracted with E. F. Flynn of Saint Peter, to receive at his mill in Saint Peter, county of [illegible], state of Minnesota, one thousand and nine hundred barrels [illegible] of flour, and transport the same and deliver to Capt. M. P. Small, commissary of subsistence for the United States, on the levee at Saint Paul, at such time as he, the said Small, shall [illegible] the [illegible] of twenty-five cents for each barrel so transported and delivered in good order.

(Signed) Temple & Beaupré,
E. F. Flynn. Agents steamer *Flora*."

The words "Agents steamer *Flora*," attached to the signature of Temple & Beaupré, are [illegible] *descriptio personae*. The rule is that when words which may be either descriptive of the person, or indicative of the character in which a person contracts, are affixed to the name of a contracting party, *prima facie* they are descriptive of the person; and [illegible] that they were not intended by the parties as descriptive of the person, but were understood as determining the character in which the party contracted, may be shown by extrinsic evidence; but the burden of proof rests upon the party seeking to change the *prima facie* character of the contract. And when a [illegible] seeks to change the *prima facie* character of the contract, so as to [illegible] the ground of agency in making the contract, the [illegible] must be established; for if he acted as an agent without authority, he is personally liable. On the trial of this cause, [illegible] position on the part of the plaintiff. The defendants [illegible]. There is no evidence to establish the [illegible] of Temple & Beaupré. In the absence of evidence [illegible] those portions of the deposition of the plaintiff [illegible] 4, 5, and 6 respectively, although under other circumstances they might be competent as evidence tending to show that the plaintiff contracted with them as agents, are not material. They were, therefore, properly stricken out. This determines the only point raised by the defendant's counsel.

The judgment below is affirmed.[1]

[illegible]

[illegible]

ried into execution. If the contract be unsealed and the meaning clear, it matters not how it is phrased, nor how it is signed, whether by the agent for the principal or with the name of the principal by the agent or otherwise. The intent developed is alone material, and when that is ascertained it is conclusive." Swayne, J., in Whitney v. Wyman, 101 U. S. 392, 395. The above passage was quoted with approval by Hocker, J., in Blount v. Tomlinson, 48 So. 751 753.

CHAPTER VI.

DELEGATION OF AUTHORITY.

Section 1.—What Authority cannot be Delegated.

LYNN v. BURGOYNE.

1852. COURT OF APPEALS OF KENTUCKY. 13 B. Mon. 400.

CRENSHAW, J.—This is an action of debt brought by Burgoyne to recover from Lynn the amount of a note, executed by him to the plaintiff for the sum of $420. Lynn relied for his defense that there was no consideration for the note.

The plaintiff, Burgoyne, was the agent of the Columbus Insurance Company, Ohio, and resided at Cincinnati; and the note was executed to Burgoyne in consideration that he, as the agent of the company, would issue to the defendant a policy of insurance to the amount of $6,000, upon the steamboat *John Drennon,* for one year.

An instrument, signed by the president of the company, purporting to be a policy of insurance, was issued and delivered to the defendant by G. W. Williams, the bookkeeper of the company at Cincinnati. This instrument, upon its face, declares that it "shall not be valid until countersigned by John Burgoyne, agent at Cincinnati." It never was countersigned by Burgoyne. But, some time after said instrument had been delivered to the defendant, two endorsements were made upon its back—one extending further privileges to the defendant, and the other transferring the instrument to Smith and others; and these endorsements are signed with the name of Burgoyne by said G. W. Williams, and it is contended that, if the policy were otherwise invalid for the want of the counter-signature of Burgoyne in regular form, that his name to said endorsements by G. W. Williams is a sufficient countersigning to make the instrument a valid policy.

Whether the instrument, had it been issued and delivered by Burgoyne himself, as a policy of insurance, would have been valid, notwithstanding an omission to countersign it, and, whether the endorse-

ments might be regarded as a sufficient countersigning and sanction of the instrument by Burgoyne, the agent, had he, himself, put his signature to them, need not be decided. For, the issuing of the instrument, and the signatures to the endorsements, are all the acts of G. W. Williams, the bookkeeper.

The deposition of Williams was taken, and he states that he had Burgoyne's "authority for signing policies of insurance; that losses were paid by said company on policies which Burgoyne had never signed in person, and that Burgoyne recognized all his acts, by reason of his connection with the company."

But whatever may have been done by Burgoyne in conferring authority upon Williams, and recognizing his acts, and in paying losses by him, incurred under policies issued by Williams, is, in our opinion, immaterial. For there is no evidence that the company had been apprized of this mode of doing business at their agency in Cincinnati, and that it had received their sanction and approbation. Whatever effect, therefore, might be given to such acts, in the absence of the counter-signature of the agent, need not be determined. The instrument itself, upon its face, is declared to be invalid, without the counter-signature of the agent, Burgoyne; he alone had authority to issue policies from the office of the company at Cincinnati, and he had no right or power to delegate this authority to another. And if it were conceded that a policy issued as this was, without the countersignature of Burgoyne, might be rendered valid and effectual by showing a subsequent approval of the company; or, that the company had known, and had been in the habit of sanctioning and approving such acts—none of these things were manifested by the proof. The agent of the company, from the nature of their business, and the large amount of capital which may be supposed to be involved, ought to be a man of intelligence, prudence and integrity. And the agent, in this case, was doubtless selected with an eye to these necessary qualities. He it is in whom the company confided, from what appears in the record, and not in Mr. Williams, who, whatever may be his intelligence, discretion, integrity and business capacity, was not the man to whom the important trusts of the company had been committed.

We are of opinion, therefore, from the record in this case, that the instrument exhibited does not appear to be a valid policy of insurance, and, consequently, that there seems to be no consideration for the note sued on.

Wherefore the judgment is reversed, and the cause remanded for a new trial.[1]

[1] "Ordinarily, the fiduciary relation of principal and agent cannot be transferred to a stranger by the agent without the knowledge or consent of his principal; and one having from another bare authority to submit a proposition of settlement, or, according to specific directions, enter into an express contract requiring the exercise of some discretion or business ability, has no

COCHELL v. REYNOLDS et al.

1900. Supreme Court of Indiana. 156 Ind. 14.

Baker, J.—Appellant duly gave notice of his application and applied to the board of commissioners of White county for a license to sell intoxicating liquors, in less quantities than a quart at a time, to be drunk on his premises. At the proper time a remonstrance in writing, bearing the names of appellees, was filed with the auditor of the county. The remonstrance was filed in pursuance of section nine of an act better to regulate and restrict the sale of intoxicating liquors (Acts 1895, p. 248), which reads: "Sec. 9. If, three days before any regular session of the board of commissioners of any county, a remonstrance in writing, signed by a majority of the legal voters of any township, or ward in any city, situated in said county, shall be filed with the auditor of the county against the granting of a license to any applicant for the sale of spirituous, vinous, malt or other intoxicating liquors under the law of the state of Indiana, with the privilege of allowing the same to be drunk on the premises where sold within the limits of said township, or city ward, it shall be unlawful thereafter for such board of commissioners to grant such license to such applicant therefor during the period of two years from the date of the filing of such remonstrance. If any such license should be granted by said board during said period, the same shall be null and void, and the holder thereof shall be liable for any sales of liquors made by him the same as if such sales were made without license. The number to constitute a majority of voters herein referred to shall be determined by the aggregate vote cast in said township or city ward for candidates for the highest office at the last election preceding the filing of such remonstrance." It is agreed that the remonstrance does not contain the required number of signatures, unless the names signed by an agent under a certain power of attorney are to be counted. By the power of attorney the agent "is hereby authorized to sign our names to any remonstrance against the granting of a license to any person he may see fit to remonstrate against receiving or having any such license, and to file such remonstrance in the office of the auditor of White county, Indiana, at any time he may see fit and present the same to the board of commissioners of White county, Indiana, and all such power and

power to delegate his authority." Fuller, J., in Fargo v. Cravens, 9 S. Dak. 646, 650.

"The attorney who has been retained to argue a cause must personally perform that duty, and he cannot entrust that duty to another, or, as said, let the case out on shares. Yet this even must be carefully applied. The retainer of one member of a firm is a retainer of all the members, and unless otherwise stipulated the cause might be conducted and argued by any one of them." Marston, J., in Eggleston v. Boardman, 37 Mich. 14, 19.

COCHRAN v. REVENUE et al.

1930. Supreme Court of Arkansas. 176 Ind. 14

Syllabus 1.—Applicant for permit to sell intoxicating liquors gave notice of his application and appeared at the board of commissioners of White county for a license to sell intoxicating liquors, which was granted, but a petition of a majority of the voters of the precinct was filed with the auditor of the county, and a remonstrance was filed in pursuance of section 1 of Act No. 1 of 1929 to regulate and control the sale of intoxicating liquors (Dig. p. 2381), which reads: 'Sec. 1. If, [illegible] days before the regular session of the board of commissioners of any county, a petition in writing, signed by a majority of the legal voters [illegible] ship, or ward to be [illegible] situated in said county, shall be presented to the county clerk against the granting of a license to any person for the sale of spirituous, vinous, malt or fermented liquors under the law of the state of Arkansas, and praying that no license be issued to any person within the limits of said township, or city ward, it shall be the duty of said board of commissioners to grant such license to such petitioner during the period of two years from the date of such remonstrance. If any such license be granted by said board during said period, the [illegible] shall be liable to any such petitioner for the same as if such sales were made without license. [illegible] to constitute a majority of voters herein required to sign the same shall be determined by the aggregate vote cast in said township or city ward for candidates for the highest office at the last preceding [illegible] filing of such remonstrance.' It is agreed that the remonstrance did not contain the required number of signatures, and was signed by an agent under a certain power of attorney. By the power of attorney the agent was authorized to affix the names to any remonstrance against granting a license to any person he may see fit to remonstrate against, and to file same with the county clerk, and to file same with the auditor of White county, and to present the same to the board of commissioners of White county, Arkansas, and all such power and

[illegible] 9 S. Dak. 640, [illegible]

"The [illegible] shall [illegible] personally perform that duty, [illegible] sale to another, or, as such, let the same out to [illegible] carefully applied. The retainer of the [illegible] and unless other wise appointed on some [illegible] agreed to and one of them." Sherman, J., in [illegible] Arkansas, 14, 29

authority is hereby granted to our said attorney in fact so to do at any time within two years from the date hereof." The error assigned is the overruling of appellant's motion for a new trial. The only question presented is whether or not the names should be counted which were subscribed to the remonstrance by an agent under the foregoing power of attorney.

In Castle v. Bell, 145 Ind. 8, it was affirmed that the hearing on an application for a liquor license is a judicial proceeding; that the application is in the nature of a complaint; that a remonstrance, on account of the immorality or other unfitness of the applicant, is in the nature of an answer; and that, by virtue of § 973 Burns 1894, § 961 R. S. 1881 and Horner 1897, authorizing a civil action to be prosecuted or defended by a party in person or by attorney, a remonstrance on account of the applicant's unfitness, signed by the remonstrators' attorney at law, is a sufficient compliance with § 7298 Burns 1894, § 5314 R. S. 1881 and Horner 1897, which provides that "it shall be the privilege of any voter of said township to remonstrate in writing against the granting of such license to any applicant on account of immorality or other unfitness as is specified in this act." Under section nine of the supplemental law of 1895, a remonstrance states facts sufficient to constitute a defense if it alleges the opposition of the remonstrators to the granting of the license. Simply that they are averse to the applicant's conducting a saloon in their township or ward is enough. That the required number, with proper qualifications, are remonstrants is to be determined by proof. Head v. Doehleman, 148 Ind. 145. Similar proceedings are found in drainage cases in the circuit courts. Sauntman v. Maxwell, 154 Ind. 114. The opposition of a majority of the voters is a defense in the judicial proceeding in which the application for the license is pending. The remonstrance stating that opposition, though not strictly a pleading, is in the nature of an answer. And it would seem to follow from the decision in Castle v. Bell, *supra,* that the parties in interest might prepare, sign and present their remonstrance in writing by an attorney at law as their representative in the judicial proceeding—if a party's signature to a pleading were the only matter involved. Section 240 Burns 1894, § 240 R. S. 1881 and Horner 1897 provides that if "the written signature of any person is required, the proper handwriting of such person or his mark shall be intended," and concurrently adds that if "a statute requires an act to be done which, by law, an agent or deputy as well may do as the principal, such requisition shall be satisfied by the performance of such act by an authorized agent or deputy." But if it were held that the demands of a statute authorizing the filing of a certain answer, signed by the party in interest, were fulfilled by the party's signature made by his authorized attorney in the case, nothing appearing in the statute to require the personal act of the party, such as a personal verification—the

present case would not be ended, because here is involved an act of the principal which, by law, may not as well be done by an agent.

In State v. Gerhardt, 145 Ind. 439, 33 L. R. A. 313, and Massey v. Dunlap, 146 Ind. 350, it was decided that by section nine of the act of 1895 there was created "a species of self-government which by the law is placed in the hands of the people to be exercised by a majority of them as they may judge to be for their best interest;" that the remonstrance authorized by section nine must be against a particular application for license and not against the liquor traffic generally; that, therefore, a general remonstrance against all applications pending and afterwards to be made within two years is unavailing.

The regulation and restraint of the sale of intoxicating liquors is an exercise of the police power of the state. That power, as an original, primary power, is lodged in the legislature. The legislature has delegated a portion of the power to the voters of the townships and city wards. To each voter is committed the right to decide whether or not he will oppose any or all applications. He may be hostile to the commerce and determine that he will resist every application. He may favor a well-regulated traffic and conclude to thwart only those applicants he deems unfit. As to the voter, the right is delegated, and not primary. A delegated right cannot lawfully be redelegated in the absence of express authority to that end from the principal. The act of 1895 does not give the voter, in respect to the decision to be made by him, the right of substitution. In this case the voters professed to authorize an agent to sign the voters' names to remonstrances in such cases as the agent should see fit. The decision was not the voters', but the agent's, multiplied in power by the number of signatures to the remonstrance. The names signed to the remonstrance under this power of attorney should not have been counted, because the voters may not confer upon another the power of deciding for them the matter committed to their judgment and discretion by the legislature. The effectiveness of an instrument by which the voters should determine for themselves the matter of discretion and employ an attorney at law or one of their own number to appear in one or all of these judicial proceedings, and prepare, sign and file a remonstrance in each case, and by which instrument the attorney accepted the employment and agreed to act upon the expressed decision of the voters, is not directly involved in this appeal.

Judgment reversed, with instructions to sustain the motion for a new trial.[1]

[1] The concurring opinion of Jordan, J., is omitted.

Compare Ludwig v. Cory, 158 Ind. 582.

"That a power conferred upon an agent because of his fitness and the confidence reposed in him cannot be delegated by him to another is a general and admitted rule. Legislatures stand in this relation to the people whom they represent. Hence it is a cardinal principle of representative government that the legislature cannot delegate the power to make laws to any other body or authority." Agnew, J., in Locke's Appeal, 72 Pa. St. 491, 494.

[illegible] WOOLLEN FACTORY COMPANY v. BRODRICK.

1890. Supreme Court of Judicature. 25 Sol. Jo. [illegible]

[illegible] C. J.—[illegible] * * * The judge cannot delegate to the clerk, to the Comptroller, or to any one else, the authority to put a matter into a bill of exceptions. He may, however, refer the [illegible] to be given in evidence and [illegible] clerk to make an indorsement from the bill by a strict compliance with its statute. Where this or that is the proper duty of counsel to the clerk [illegible] is required of him is to register the decision of the judge as to what shall go into the bill of exceptions. In this instance it appears in the bill of exceptions [illegible] that the judge delegated to the clerk the authority to take from a record in the justice's office an extract and insert it in the bill. This was an improper delegation of duty. [illegible] as it involved upon the clerk the duty of determining what portion of the record should go into the bill, as well as the duty of ascertaining what was actually in evidence. If the order had been [illegible] of record in another state, or in another county, we [illegible] establish that the judge could not assign to the clerk the duty of [illegible] it into the record, and the principle must be the same [illegible] of the question of the locality of the record. The only [illegible] can be safely followed is that which requires the instrument [illegible] given in evidence to be identified by the judge, leaving [illegible] the clerk to do but file and copy them.[2]

HARRALSON & CO. v. STERN.

1890. Supreme Court of Alabama. 86 Ala. 347.

[illegible] for [illegible] of goods sold; recoupment of damages.

[illegible]—This suit was commenced before a justice of the [illegible] Harralson & Co. as plaintiffs against A. D. Stern as [illegible] for the value of a box of tobacco sold and delivered by the [illegible] to the defendant. Before the justice, the plaintiffs recovered against the defendant and from this judgment the

[illegible] of [illegible] of Mr. [illegible] was held the ordinary [illegible] [illegible] confined to the only charge upon the merits [illegible] [illegible] delivered to others. To what other [illegible] [illegible] Bailey, [illegible] 8 B. [illegible]. In the later case [illegible] [illegible] the [illegible] powers which are granted [illegible] by one person to both [illegible] [illegible]

present case would not be [illegible] because [illegible] involved an act of the principal which, by law, [illegible] as well be done by an agent.

In State v. [illegible] 130 [illegible] 313, and Massey v. [illegible], 144 Ind. 330, [illegible] that by section nine of the act of 1895 there was [illegible] of self-government which by the law is placed in the [illegible] people to be exercised by a majority of them as they may [illegible] best interest;" that the remonstrance [illegible] must be against a particular application for [illegible] against the liquor traffic generally; that, therefore, a [illegible] remonstrance against all applications pending and afterward [illegible] within two years is unavailing.

The regulation [illegible] of the sale of intoxicating liquors is an exercise of [illegible] power of the state. That power, in its original [illegible] is vested in the legislature. The legislature has delegated [illegible] the power to the [illegible] of the townships and city [illegible] is committed the right to decide whether [illegible] or all applicants. He may be [illegible] that he will resist every application [illegible] traffic will conclude to thwart [illegible] As to the voter, the right is [illegible] delegated right cannot lawfully be [illegible] authority to that end from the [illegible] give the voter in respect to the [illegible] right of substitution. In this case the [illegible] agent to sign the voters' names to [illegible] agent should see fit. The decision [illegible] multiplied in power by the num- [illegible] The names signed to the remonstrance [illegible] should not have been [illegible] could not confer upon another the power [illegible] committed to their judgment and discretion by the [illegible] The effectiveness of an instrument by which the voters [illegible] for themselves the matter of [illegible] or one of their own number to appear [illegible] proceedings, and prepare, sign and file a remonstrance [illegible] and by which instrument the [illegible] and agreed to act upon the ex- [illegible] of the [illegible] not directly involved in this appeal.

Judgment reversed, [illegible] to sustain the motion for a new trial.[illegible]

[illegible] is omitted.

[illegible]

[illegible] his fitness and the confidence reposed in him cannot be [illegible] by him to another is a general and admitted rule. Legislators [illegible] relation to the people whom they represent. Hence it is a cardinal principle of representative government that the legislature cannot delegate the power to make laws to any other body or authority. [illegible] 494.

SEYMOUR WOOLEN FACTORY COMPANY v. BRODHECKER, TREASURER.

1891. SUPREME COURT OF INDIANA. 130 Ind. 389.

ELLIOTT, C. J.—[1] * * * The judge cannot delegate to the clerk, to the stenographer, or to any one else, the authority to put a written instrument into a bill of exceptions. He may, however, where the instrument has been given in evidence, and is clearly identified, cause its introduction into the bill by a strict compliance with the statute. Where this is done no judicial duty is delegated to the clerk, for all that is required of him is to register the decision of the judge as to what shall go into the bill of exceptions. In this instance the recitals of the bill of exceptions indicate that the judge delegated to the clerk the authority to take from a record in the auditor's office an order and insert it in the bill. This was an improper delegation of duty, inasmuch as it devolved upon the clerk the duty of determining what part of the record should go into the bill, as well as the duty of determining what was actually in evidence. If the order had been entered of record in another state, or in another county, we think no one would doubt that the judge could not assign to the clerk the duty of bringing it into the record, and the principle must be the same irrespective of the question of the locality of the record. The only rule that can be safely followed is that which requires the instruments actually given in evidence to be identified by the judge, leaving nothing for the clerk to do but file and copy them.[2]

HARRALSON & CO. v. STEIN.

1873. SUPREME COURT OF ALABAMA. 50 Ala. 347.

ACTION for price of goods sold; recoupment of damages.

PETERS, C. J.—This suit was commenced before a justice of the peace, by Harralson & Co., as plaintiffs, against A. D. Stein, as defendant, for the value of a box of tobacco sold and delivered by the plaintiffs to the defendant. Before the justice, the plaintiffs recovered a judgment against the defendant, and from this judgment the

[1] A portion of the opinion is omitted.

[2] In Thomson v. City of Boonville, 61 Mo. 282, it was held that authority to pave and improve the streets conferred by the city's charter upon the mayor and council could not be delegated to others. To same effect see Jackson Co. v. Brush, 77 Ill. 59, and State v. Fiske, 9 R. I. 94. In the latter case Durfee, J., said: "The rule is well settled that discretionary powers which are granted to one person or body cannot, by that person or body, without leave, be delegated to another."

defendant appealed to the circuit court, where there was a trial *de novo*. On this trial there was evidence tending to show that Stein went to the plaintiffs, to purchase a lot of tobacco. When Stein arrived at plaintiff's store, he met one of the plaintiffs, and informed him of his purpose to buy tobacco; and plaintiff directed his clerk, Jordan, to "sell to Mr. Stein all the tobacco you can." The clerk then sold to Stein ten boxes of tobacco which, except one, were in the United States bonded warehouse, and one was in the store of the plaintiffs. The sale was completed, except the payment of the money and the delivery of the tobacco. Before this was done, one of the plaintiffs, who were factors, and held the tobacco for sale in their character as commission merchants and factors, and the same partner who had directed the clerk to make the sale, returned, and being informed that the price at which the tobacco had been sold was sixty cents a pound, when the instructions of his principals were to sell it at seventy cents a pound, he refused to deliver the tobacco under the sale by the clerk, except one box, which was in the store when the sale occurred. This box was delivered, and carried away by Stein, at the price agreed on between Stein and the clerk. The clerk was the general agent of the factors, authorized by them to sell any goods consigned to them, intrusted to his care. This sale by the clerk was made on the 16th day of February, 1872. A few days after this, Stein returned to the store of Harralson & Co., asked for his bill, and proposed to pay for the tobacco sold to him by the clerk, and demanded the delivery of the tobacco under the sale by the clerk. The sale was then repudiated by Harralson & Co., and they refused to receive pay for the same, and to deliver it to Stein. The weight of the tobacco in all the boxes was shown to be about six hundred pounds. The quantity of the tobacco in the box which was delivered was also shown. Stein refused to pay for this; and Harralson & Co., in their own name, sued to recover its value; and Stein pleaded, in recoupment of damages, that he had been injured by Harralson & Co. by their failure and refusal to deliver to him the tobacco, which they had sold to him by their clerk, to a greater amount than the value of the tobacco which had been delivered, and for which the present suit was brought. There was a judgment for Stein in the court below, and Harralson & Co. appealed to this court.

There were two questions raised on the trial below, which were decided adversely to the appellants, to which they excepted, and which are insisted on as error in this court. The one was, that the appellants, being factors and commission merchants, could not make a sale of the goods consigned to them by the agency of their clerk. The other was as to the measure of damages when insisted on by way of *recoupment*.

1. Upon the first proposition thus presented, it is contended that the appellants, being factors and commission merchants, were merely the agents of the owner of the tobacco, and could not sell it by their

clerk. This is said upon the principle, that an agency being a delegated authority, it cannot be executed by a sub-agent; which is expressed in the maxim, *Delegata potestas non potest delegari.* But this maxim seems to refer to those agencies which involve the execution of a bare power; and although this may apply to factors and commission merchants in certain cases, yet it is not, as to them, an universal restriction. Story on Agency, §§ 13, 14; 2 Kent, p. 633, marg. But this principle is only invoked when the attempt is made to bind the owner by the acts of the sub-agent. It is otherwise, when the factor assumes the position of principal, and the contract is attempted to be enforced in his name, as is the case in the present suit. When this is the case the factor makes himself the principal in the transaction, and his clerk, who acts under his direction, becomes his agent; and in this way he consents to be bound by the law which governs the acts of parties who sustain such relations as principal and agent. It has been repeatedly settled by this court that an administrator may bind himself by a sale of the decedent's personal property, which is void as to the estate; for the reason, doubtless, that he will not be permitted to undo what he has deliberately done to another's injury. Snedicor v. Mobley, 47 Ala. 507; 12 Ala. 298; 5 Port. 64. Here the sale was made by the factor's clerk, by their direction, and they are seeking to enforce it in part by this suit. If they choose to act in this way they submit thus to be bound. The same would be the case with the vendee. After the sale is completed, neither party to the contract can repudiate it. Such is the case here.[1] * * * The judgment of the court below is affirmed.[2]

[1] A portion of the opinion is omitted.

[2] "The principle, that an agent cannot delegate his authority, is founded upon the special trust and confidence reposed by the principal in the personal skill and integrity of the agent. The agent, therefore, has no authority to turn his principal over to another, of whom he knows nothing, but remains responsible to his principal in all such cases of sub-agency. But it by no means follows that third persons, who deal with sub-agents, knowing the agency, are to be absolved from acts or contracts made by such agents in the name of the principal. We have just seen that, while the original agent is liable to his principal for the acts or misconduct of sub-agents employed without the authority of the principal, the principal is liable to third persons. As third persons, therefore, treat with the sub-agent, under the law, as with one having full authority, they have no right, as against such principal, to set up that the sub-agent is without authority to act for the benefit of the principal." Harris, J., in Mayer v. McLure, 36 Miss. 389, 403.

Section 2.—What Authority can be Delegated.

McKINNON and others v. VOLLMAR and another.

1889. Supreme Court of Wisconsin. 75 Wis. 82.

Lyon, J.—[1] * * * The jury did not find that Siebert was the agent of defendants to sell their land, but the undisputed evidence establishes the fact that he was. The jury found that Siebert employed Greeves to show Derfus the land. Was Greeves the agent of the defendants? The answer depends upon the question of Siebert's authority to employ a sub-agent for that purpose.

The rule is that an agent in whom is reposed some trust or confidence in the performance of his agency, or who is required to exercise therein discretion or judgment, has no authority to intrust the performance of those duties to another, and thus bind the principal for the acts of the latter, without the consent of his principal. Numerous cases illustrating this rule will be found cited in 1 Am. & Eng. Ency. of Law 368, note 4. On the other hand, an agent may appoint a sub-agent to do acts in the course of the agency which do not call for the exercise of judgment or discretion, but which are purely executive or ministerial, and the principal is bound by the acts of such sub-agent. Renwick v. Bancroft, 56 Iowa 527; Lyon v. Jerome, 26 Wend. 485; 37 Am. Dec. 271; Ewell's Evans on Agency *43, and cases there cited.

In this case the showing of the land to Derfus was a mere executive or ministerial act, requiring no exercise of judgment or discretion, and it was therefore entirely competent for Siebert to employ Greeves to perform it. It may be observed here that the defendants knew that Greeves had been selected by Siebert to show Derfus the land, and made no objection thereto. Indeed, it seemed to be a very proper appointment, for Greeves had been upon the land, and estimated the timber thereon, and of course knew the location thereof, while it does not appear that Siebert ever saw the land. For the above reasons it must be held that Greeves was the agent of the defendants for the purpose of showing the lands to Derfus, and the defendants are responsible for the manner in which he performed the duties of such agency.

Greeves did not in person point out the land to Derfus, but he did so just as effectually as though he had gone upon the land in person and told Derfus that it was the defendant's land, for the purchase of which he was negotiating. He told Kirwin what particular tract of land he was to show Derfus, and Kirwin showed him such tract as he was directed to do. Thus Kirwin was the mere instrument of Greeves, and his act in thus pointing out the land was, in sub-

[1] A portion of the opinion is omitted.

Section 2.—What Authority may be Delegated.

[illegible] v. [illegible]

1885. [illegible] 53 Wis. 82.

[illegible] jury did not find that Siebert was the agent of defendants in their sale, but the undisputed evidence establishes that fact as well. The jury found that Siebert employed Greeves to cut Derfus the land. Was Greeves the agent of the defendants? [illegible] upon the question of Siebert's authority as defendants' agent in that matter.

The [illegible] is where a person, whose trust or confidence [illegible] of the capacity of which is required to exercise [illegible] authority to intrust the performance of some [illegible] and thus bind the principal by the [illegible] within the scope of his principal. No [illegible] that will be found cited in 1 Am. & [illegible] On the other hand, an agent may [illegible] in the course of the agency which do not [illegible] of judgment or discretion, but which are [illegible] and the principal is bound by the [illegible] Bank v. Prescott, 56 Iowa 527; 1 Jon [illegible] Dec. 291; Ewell's Evans on [illegible]

[illegible] of the land to Derfus was a mere execu- [illegible] involving no exercise of judgment or discre- [illegible] competent for Siebert to employ [illegible] and [illegible] that the defendants [illegible] to Siebert to show Derfus the [illegible] Indeed, it seems to be a very [illegible] upon the land, and cer- [illegible] course knew the location thereof, [illegible] Greeves was the agent of the [illegible] in showing the lands to Derfus, and the [illegible] in which he performed [illegible]

[illegible] the land to Derfus, but he did [illegible] upon the land in per- [illegible] the defendants' land for the pur- [illegible] Derfus what particular [illegible] and Greeves showed him such [illegible] Greeves was the mere instrument [illegible] land was, in effect

stance and legal effect, the act of Greeves, the agent of the defendants. Hence there is no question in the case as to whether Kirwin was or was not the agent of the defendants in what he did. Literally obeying the orders of Greeves, as he did, his acts were the acts of Greeves. An agent who, because of the trust and confidence reposed in him by his principal, cannot bind his principal by the acts of a sub-agent may still employ another to do some specific act in the business of his agency, and if such other do that act as directed, the principal is liable, not because the person performing the act is his agent, but because the act is the act of his agent who directed it to be done.

It follows from the foregoing views that the defendants are liable for the act of their agent in thus showing Derfus the wrong land, although he did so through the instrumentality of Kirwin.[2]

COMMERCIAL BANK OF LAKE ERIE v. NORTON.

1841. Supreme Court of New York. 1 Hill 501.

Assumpsit, tried at the Erie circuit, before Gridley, C. Judge, August 29, 1840. The plaintiffs sought to recover as endorsees of two bills of exchange drawn by Gillespie, Joice & Co., on E. Norton & Co., payable to Gillispie & Woodruff, at sixty days after date. The firm of E. Norton & Co. was composed of said Norton and Simeon Fox, two of the defendants, who alone defended the suit.

The acceptance on each of the bills was in this form: "E. Norton & Co. Per A. G. Cochrane," and was in Cochrane's handwriting.

The bills were discounted on the day of the date, by the plaintiffs for the drawers, and were afterwards accepted for the drawers' accommodation; the defendants Norton and Fox having no funds of the drawers, but the latter being then largely indebted to them.

Henry Norton testified on the trial that he directed Cochrane to

[2] "It may, indeed, be true that under the maxim *'Delegata potestas non potest delegari,'* an agent or broker whose employment involves any exercise of judgment or discretion may not transfer to another the right and power to discharge his own duty. Nevertheless, when an act to be done is ministerial or mechanical only, the agent may employ another to do it; and in such case the act is as well performed by the sub-agent as by the agent." Green, J., in Ryer v. Turkel (N. J.), 70 Atl. 68, 71.

"An insurance agent can authorize his clerk to contract for risks, to deliver policies, to collect premiums, and to take payment of premiums in cash or securities, and to give credit for premiums, or to demand cash; and the act of the clerk in all such cases is the act of the agent, and binds the company just as effectually as if it were done by the agent in person." Earl, C., in Bodine v. Exchange Fire Ins. Co., 51 N. Y. 117, 123. To same effect see German Fire Ins. Co. v. Columbia, etc., Co., 15 Ind. App. 623.

accept these bills, the latter being the bookkeeper of E. Norton & Co. As to Henry's own authority, he testified that he was the general agent of E. Norton & Co., financial and otherwise, they not interfering in the business but being engaged mostly elsewhere; that, with their knowledge and assent, he had been in the habit of drawing drafts, making notes and endorsements for them; though, by the written articles of co-partnership between E. Norton and Fox, his (the witness,) power was more limited.

The defendants' counsel moved for a nonsuit upon the ground that the acceptances were made without authority; but the circuit judge denied the motion, and the defendants' counsel excepted. He further insisted at the trial that the acceptances were without consideration and therefore void. The circuit judge ruled the contrary; whereupon the said counsel again excepted. Verdict for the plaintiffs. The defendants now moved for a new trial on a bill of exceptions.

COWEN, J.—(After deciding that there was sufficient evidence to go to the jury on the question whether Henry Norton had authority to accept.) But it is said he could not delegate the power to accept. This is not denied, nor did he do so. The bills came for acceptance; and having as agent made up his mind that they should be accepted, he directed Cochrane, the bookkeeper, to do the mechanical part—write the acceptance across the bills. He was the mere amanuensis. Had anything like the trust which is in its nature personal to an agent, a discretion for instance, to accept what bills he pleased, been confided to Cochrane, his act would have been void. But to question it here would be to deny that the general agent of a mercantile firm could retain a carpenter to make a box or a cooper to make a cask. The books go on the question whether the delegation be of a discretion. Such is the very latest case cited by the defendants' counsel; Emerson v. Prov. Hat Mfg. Co., 12 Mass. 237, 241, 242, and the latest book. 2 Kent Com., 633, 4th ed. Blore v. Sutton, 3 Meriv. 237, is among the strictest cases I have seen. There the clerk of the agent put his own initials to the memorandum, by direction of the agent; and held insufficient. Henderson v. Barnewall, 1 Young & J. 387, followed it. Both were cases arising under the statute of frauds, which requires that the memorandum should be signed by the principal or his agent; and I admit it is very difficult to distinguish the manner of the signatures there from that now in question by Cochrane. Everything there seems to have been mechanical merely, as here; and there may be some doubt, I should think, whether such cases can be sustained. At any rate in our attempt to apply them, we are met with a case as widely the other way. Ex parte Sutton, 2 Cox 84. The rule as there laid down is that "an authority given to A to draw bills in the name of B may be exercised by the clerks of A." Such is the marginal note, and it is entirely borne out by the case itself. Peter Marshall wrote to Lewis & Potter

[illegible] to make use of his name by procuration or otherwise to draw bills on G. & J." The clerk of Lewis & Foster drew one bill, signing thus: "By procuration of Peter Foster, Robert Edgecombe." The Lord Chancellor put it on the ground that the signature of the clerk would have bound Lewis & Foster, and he signed their name under the general authority which he had. We [illegible] progress one step over the other in these agency authority. Each to go on the principle of any other business that I have seen, and there are many, all we have to say is, I think, that the agent shall not delegate his discretion, but may do what ministerial acts he chooses. I do not know that the language of Lord Ellenborough in Mason v. Joseph, 4 Smith 491, has been absolutely strictly carried into an adjudication. But it sounds [illegible] of the case proceeding to go on principles that I can scarcely think to be right," this Lordship said. "It is true an attorney appointed to deed cannot delegate his authority to a third person. He must exercise his own judgment on the principal subject for the purpose of which he is appointed; but as to any mere ministerial act, it is not necessary that he should do it in person, to be direct it to be done or upon a full knowledge of it adopt it. Suppose his attorney had got the deed in his hands, and could not actually sign himself, he might have authorized another to sign for him." [illegible]

Nevertheless denied.

Section 3.—Power to Delegate Implied from Circumstances.

PRESIDENT, DIRECTORS AND COMPANY OF THE AV[illegible] v. DAVIS v. McGILVRAY AND OTHERS.

1832. Supreme Judicial Court of Massachusetts. 4 Cush. 131.

Assumpsit to recover $450.45, received by the defendants to the plaintiffs' use.

At the trial before Bigelow, J., the plaintiffs, to prove their case, called a witness, who testified that he had been an accountant between Stearns and Lowell for seven years, and also was his whole business, and sometime previous to April 7, 1854, he received for collection from the defendants a partnership demand against [illegible] and Lowell, for $450.45 with the [illegible] due on the [illegible] and the

[illegible] of the [illegible] is omitted.

[illegible] Cushing, 12 Cush. 267, ante.

[illegible] v. Bank of [illegible], 21 N. Y. 210, it was held that the [illegible] had delegated to his clerk authority to endorse checks drawn on the [illegible] and collect payment of them.

authorizing them "to make use of his name by procuration or otherwise to draw bills on G. & J." The clerk of Lewis & Potter drew the bill, signing thus: "By procuration of Peter Marshall, Robert Edgecumbe." The Lord Chancellor put it on the ground that the signature of the clerk would have bound Lewis & Potter, had he signed their name under the general authority which he had. We thus make very little progress one way or the other on direct English authority. Left to go on the principle of any other English case I have seen, and there are many, all we have to say is, I think, that the agent shall not delegate his discretion; but may at least do any mechanical act by deputy. I do not know that the language of Lord Ellenborough in Mason v. Joseph, 1 Smith 406, has been anywhere directly carried into an adjudication. But it sounds so much like all the cases professing to go on principle, that I can scarcely doubt its being law. His Lordship said: "It is true an attorney appointed by deed cannot delegate his authority to a third person. He must exercise his own judgment on the principal subject for the purpose of which he is appointed; but as to any mere ministerial act, it is not necessary that he should do it in person, if he direct it to be done or upon a full knowledge of it adopt it. Suppose, for instance, he had got the gout in his hands, and could not actually sign himself, he might have authorized another to sign for him.[1] * * *[2]

New trial denied.

Section 3.—Power to Delegate Implied from Circumstances.

PRESIDENT, DIRECTORS AND COMPANY OF THE APPLETON BANK v. McGILVRAY AND OTHERS.

1855. SUPREME JUDICIAL COURT OF MASSACHUSETTS. 4 Gray 518.

ACTION of contract to recover $370.42, received by the defendants to the plaintiffs' use.

At the trial below Bigelow, J., the plaintiffs, to prove their case, called a witness, who testified that he had been an expressman between Boston and Lowell for eleven years, and that was his whole business; that sometime previous to April 7, 1854, he received for collection from the defendants, a partnership doing business in Boston, two notes of J. C. Hildreth & Co., a partnership doing business in Lowell, for $370.42 each, the one due on the 7th and the

[1] A portion of the opinion is omitted.

[2] See Grady v. American Cent. Ins. Co., 60 Mo. 116.

In People v. Bank of America, 75 N. Y. 547, it was said that the state treasurer could delegate to his clerk authority to endorse drafts drawn to the treasurer's order in payment of taxes.

other on the 13th of April, and both payable to the defendants, and endorsed in blank by them; and was directed to collect them in the ordinary way, without any directions as to protesting them, and gave his receipt therefor; that it was sometimes his custom to collect notes by depositing them in a bank, and sometimes by calling on the parties personally, though he did not communicate to the defendants how he was going to collect their notes, and did not know that they knew he ever collected notes delivered him through the banks; that before the 7th of April he deposited the notes with the plaintiffs, a bank in Lowell, for collection; that on the 8th of April he called on the plaintiffs, and asked if the note due the day before had been paid, and was informed by a clerk of the plaintiffs that it had been, and received the amount of it from the plaintiffs; that the plaintiffs received no compensation for collecting these notes, and he did not communicate to the plaintiffs, when he left the notes, to whom they belonged; that he took the money so paid and the same day paid it to the defendants, but did not remember telling the defendants when he paid them the money, that he collected it through the plaintiffs or any bank; and the defendants paid him for his services.

Bigelow, J.—The objection that this action cannot be maintained for want of privity between the parties to the suit is not sustained by the proof. The rule of law is well settled that in the absence of any authority, either express or implied, to employ a sub-agent, the trust committed to an agent is exclusively personal, and cannot be delegated by him to another so as to affect the rights of the principal. In such case, if the agent employs a substitute, he does it at his own risk and upon his own responsibility. The agent only is liable to the principal, and the sub-agent is responsible solely to his immediate employer; nor can the principal be liable for the acts of the sub-agent. There is no privity between them upon which any mutual rights and remedies can be based.

But this general rule is always subject to be modified by the peculiar circumstances of each particular case, from which, or from the usage of trade, a power to delegate an authority can be inferred. Story on Agency, §§ 14, 388.

In the case at bar it appears that the defendants delivered the note for collection to the carrier with directions "to collect it in the ordinary way," and that it was his custom to collect notes by depositing them in a bank, as well as by calling on the parties personally. The directions given by the defendants were equivalent to an authority to adopt either of the modes for collecting the note which the carrier was in the habit of using, and well warranted the jury in finding that the plaintiffs were duly employed as the agents of the defendants in this particular transaction. We cannot doubt that if the carrier had died or become insolvent before payment to him of the amount collected by the plaintiffs, the defendants, upon disclosure of the agency, would have had a good claim therefor against the

plaintiff. The power necessary to make the person liable to such order is created by the authority to employ a sub-agent, which is fairly to be inferred from the evidence. [ ]

Judgment of the Court.

INHABITANTS OF BUCKLAND v. INHABITANTS OF CONWAY.

1910. October 24, 25, 26, 27. November 1. 1911. March 22.

[ ] was a pauper who, previous to [ ], had resided in the parish of Buckland, as settled in Conway, which had been owned by the pauper, and of which he had taken the rents and profits, and generally acted as the other yearly tenants of that parish; so that he had thereby acquired a settlement in Conway.

The question was as to the [ ] term, which, if applicable to such a case, would have entitled the pauper to the benefit of a settlement by [ ] for the defendants should recover against the plaintiffs the costs of the reference and the costs of suit.

The plaintiffs disputed the application of this recent statute, but the arbitrator had been created into a tribunal according to their own agreement. It appeared that the case had proceeded regularly before the arbitrator, without any objection having been taken by the plaintiffs at any time, and that the arbitrator had entered on the reference at their request and proceeded to the hearing of the cause on behalf of the plaintiffs, the case of defendants had been made. They also objected that the award was conditional, in that it contained no decision, judgment or determination upon the merits of the dispute, but it was made dependent upon the acceptance, not [ ] between the parties.

Held, [ ]—The agents of a body appointed to administer a statute have general authority to conduct the ordinary business of the body as to the manner of exercising their powers, and to decide questions arising in connexion therewith, subject to appeal to a full board of directors. Agents thus appointed have the power of the principal in delegating, so far as to appoint attorneys and counsel who, when they have become such of record, have the same power as solicitors to authorize to be done in the course of the suit all the acts necessary to be done in the conduct of the suit by the agents themselves. An authority to prosecute or defend a suit implies power to refer it by rule of court, and thereby a power to enforce an undertaking.

As to the objection as to the reports in reference to the decisions that

[ ] appeal of the plaintiffs dismissed.
[ ] [ ] [ ] [ ] [ ] [ ] [ ].
[ ] [ ] [ ] [ ] [ ].

plaintiffs. The privity necessary to make the parties liable to each other is created by the authority to employ a sub-agent, which is fairly to be inferred from the evidence.[1] * * *[2]

Judgment on the verdict.

INHABITANTS OF BUCKLAND v. INHABITANTS OF CONWAY.

1820. Supreme Judicial Court of Massachusetts. 16 Mass. 396.

This was a pauper cause pending in Franklin county, in which the question was whether an estate in Conway, which had been owned by the pauper, and of which he had taken the rents and profits three years successively, was of the clear yearly income of three pounds; so that he had thereby acquired a settlement in Conway.

The action was, at the May term, 1819, submitted by rule of court to certain referees, who made their report at the last May term in Franklin, that the defendants should recover against the plaintiffs the costs of the reference and the costs of court.

The plaintiffs opposed the acceptance of this report, alleging that the submission had been entered into without authority from them, and against their will. It appeared that the town had appointed agents to prosecute the action, without any particular instructions as to the conduct of it; and that the agents thus appointed had employed an attorney of this court to commence and prosecute the action, by whose assent on behalf of the plaintiffs the rule of submission had been made. They also objected that the report was insufficient, in that it contained no opinion, judgment or determination upon the merits of the cause; that it was not conclusive upon the subject-matter, nor final between the parties.

Parker, C. J.—The agents of a town, appointed to prosecute a suit, have general authority to conduct the suit, unless restricted by the town as to the manner of executing their trust. A vote to choose agents, and a choice in conformity thereto, is equivalent to a full power of attorney. Agents thus appointed have the power of substitution or delegation, so far as to appoint attorneys and employ counsel; who, when they have become such of record, have the same power, in relation to anything to be done in the progress of the suit, as the agents themselves. An authority to prosecute or defend a suit implies a power to refer it by rule of court, that being a legal mode of prosecuting or defending.

As to the validity of the report in reference to the objection that

[1] A portion of the opinion is omitted.

[2] See Loomis v. Simpson, 13 Iowa 532, 535.

it does not adjudicate upon the subject-matter submitted to the referees, we think it sufficient, because, by necessary implication, it must be considered as a determination upon the question. They award that the defendant town shall recover the costs of the action. This they could not have done without having decided the point in controversy in their favor; at least, the legal presumption is, that they so determined. The judgment of the court will be, that the plaintiffs take nothing by their writ, and that the defendants recover their costs: and this makes a final determination of the action, which is what was submitted to the referees.[1]

DORCHESTER BANK v. NEW ENGLAND BANK.

1848. Supreme Judicial Court of Massachusetts. 1 Cush. 177.

Wilde, J.—This is an action of assumpsit; but the foundation of the plaintiff's claim is the alleged negligence of the defendants, in not collecting certain bills left with them for collection by the plaintiffs.

The defendants proved that they placed these bills in the hands of the Commonwealth Bank for collection, the same being payable in the city of Washington, where the defendants had no correspondents. This, the plaintiff's counsel contend, the defendants had no right to do, on the ground that an agent has no right to delegate his authority to a sub-agent without the assent of his principal. This, no doubt, is generally true; but when, from the nature of the agency, a sub-agent or sub-agents must necessarily be employed, the assent of the principal is implied. Such was the nature of the agency in the present case. It could not have been expected that the defendants would employ one of their own officers to proceed to Washington to obtain payment of the bills. The bills undoubtedly were intended to be transmitted to Washington for collection, and if the defendants employed suitable sub-agents for that purpose, in good

[1] See Page v. Hardin, 47 Ky. 648, regarding the power of the Secretary of State of Kentucky to appoint a deputy. On page 662 Marshall, C. J., said: "Indeed, by the common law, a ministerial officer might, generally, appoint a deputy, whose acts in his name were valid. It may easily be supposed that from the increased business of the office of Secretary, arising from various causes, the assistance of a deputy might become indispensable, and that even if the business did not regularly require it, there might be various casualties, which would render it necessary for the convenience of the public that the official duties of the Secretary should be occasionally performed by another for him."

"An under sheriff may appoint a bailiff for the purpose of doing a particular act; though he cannot appoint a deputy to do the general business of the office." Starnes, J., in McGuffie v. State, 17 Ga. 497, 508.

NEW ENGLAND BANK.

1 Wash. 177.

faith, they are not liable for the neglect or default of the sub-agents. This was so decided in Fabens v. Mercantile Bank, 23 Pick. 330. The chief justice, in delivering the opinion of the court, says: "It is well settled that when a note is deposited with a bank for collection, which is payable at another place, the whole duty of the bank so receiving the note, in the first instance, is seasonably to transmit the same to a suitable bank or other agent at the place of payment. And as a part of the same doctrine, it is well settled that if the acceptor of a bill or promisor of a note has his residence in another place, it shall be presumed to have been intended and understood between the depositor for collection and the bank that it was to be transmitted to the place of the residence of the promisor." This decision of the court on both points is, we think, well founded in principle, and supported by a decided weight of authority. The only opposing decision is in the case of Allen v. Merchants Bank, which was first reported in 15 Wend. 482, and which was afterwards removed to the court of errors, where the judgment of the court below was reversed by a majority of the court of errors. This reversal is opposed to a number of decisions of great authority, and is not, as we think, well founded in principle. If the bank in that case acted in good faith, in selecting a suitable sub-agent, where the bills were payable, there seems to be no principle of justice or public policy, by which the bank should be made liable for the neglect or misfeasance of the sub-agent. And it is admitted, by Mr. Senator Verplanck, who states the grounds of the reversal of the judgment, that the bank would not have been liable, if there had been an understanding or agreement, express or implied, that the bills were to be transmitted to another bank for collection. Now, we think, in that case, as in this, there was manifestly such an understanding. There is another view of that case, taken by the learned senator, in which we cannot concur. He makes no distinction between the neglect of the officers of the bank where the bills were deposited, and that of the bank to which they were transmitted for collections. We think the distinction is obvious. We agree, however, with the learned senator, that the decisive question in such cases is, what was the understanding of the parties, as to the duties the collecting bank undertook to perform. And as to this we have no doubt of the understanding of the parties in the present case. That was, we think, that the defendants were to transmit the bills, or to cause them to be transmitted, to some suitable bank or other agent in Washington, for collection; and the questions are, whether, in employing the Commonwealth Bank to transmit the bills, the defendants acted in good faith; and if so, whether they are responsible for the failure of that bank. That the defendants acted in good faith we cannot doubt. The Commonwealth Bank at the time was in perfectly good credit, and had great facilities for obtaining payment of bills and notes payable in distant states. The defendants were the plaintiffs' general agents, and they

had no instructions; they were, therefore, to exercise their best judgment as to the transmission of the bills, and the remittance of the money when collected. And we see no cause to doubt that they acted in good faith, and exercised a sound judgment. It was objected that the defendants ought to have made restricted endorsements; but it is a satisfactory answer that the defendants made their endorsements in the same manner the plaintiffs did. Considering, then, that the defendants acted in good faith, and exercised a sound judgment in employing the Commonwealth Bank, we think there is no principle of law or equity which can subject them to any liability by reason of the subsequent failure of that bank.

In our opinion the defendants' responsibility was limited to good faith and due discretion in the choice of an agent to transmit the bills, and to procure a remittance of the money when paid. This case is not distinguishable from the case of Fabens v. Mercantile Bank, and the cases there cited.

We do not think that the proof of any usage is necessary to support these decisions; but in the present case, the usage is well proved to have been uniform, in similar cases, ever since the year 1833 or 1834, three or four years before these bills were deposited in the defendant bank.

It was also proved that one bill had been transmitted in like manner, by the defendants, for the plaintiffs, and returned to them with protest, and without objection by them. This was in 1836, more than a year before the bills in this case were deposited. This would be sufficient notice of the usage or manner in which the defendant transacted such business, if any such notice were required. It seems, however, that the usage of a bank is binding on all persons dealing with the bank, whether they know of the usage or not: Lincoln and Kennebeck Bank v. Page, 9 Mass. 155; Bank of Washington v. Triplett, 1 Pet. 25. That is a point, however, not necessary to be decided in this case.

Plaintiffs' nonsuit.[1]

[1] *Accord:* East-Haddam Bank v. Scovil, 12 Conn. 302; Merchants' National Bank v. Goodman, 109 Pa. St. 422.

Contra: Corn Exchange Bank v. Farmers' Nat. Bank, 118 N. Y. 443; Davey v. Jones, 42 N. J. L. 28.

See collection and discussion of authorities in Simpson v. Waldby, 63 Mich. 439, 447–450.

See Ames' Cases on Trusts, 17.

CHAPTER VII

LIABILITY OF PRINCIPAL TO THIRD PERSONS

Section 1.—Contracts.

SUTTON v. TATHAM.

1839. COURT OF QUEEN'S BENCH. 10 A. & E. 27.

[illegible] for the work and labor, etc., of plaintiffs were and be-
[illegible] by them as the brokers and agents of and for defendant on
[illegible] and at his request, and for consideration and reward duly
[illegible] to plaintiffs in respect thereof. Counts for money
[illegible] and on account stated. Plea, non-assumpsit. On the trial
[illegible] Lord Denman, C. J., at the sittings in London after last
[illegible] term, the following facts appeared: The defendant had em-
[illegible] the plaintiffs as brokers and had dealings with them in stock
[illegible] shares for three or four years. On May 28, 1838, he gave directions to the plaintiffs to sell for him 250 shares in the South Australian Company. They accordingly, on May 30th, sold 100 such shares to Wells, a broker, and advised defendant thereof by letter of that day; and on May 31st they sold Wells 150 more such shares. On the same day the defendant came to the plaintiffs' counting-house and said that there had been a mistake and that he had intended only to sell fifty shares. He, in fact, had not the number sold by the plaintiffs. On the following day one of the plaintiffs, Mr. Sutton, had an interview with the defendant's son, at which [illegible] objection, the latter said "he had got into a difficulty," and said "it was an unfortunate mistake." Defendant asked if the bargain could not be made void? Sutton said "No." Defendant then said "he must leave the matter in their hands to do the best they could." Plaintiffs, on the 31st, applied to Wells to cancel the bargain, informing him of the mistake, but he declined, saying it was too late. The stock exchange is governed by rules of a committee [illegible] printed, and one of them is, that if the selling broker [illegible] prepared to fulfil his contract the purchaser may buy in order to make up the deficiency, and charge the selling broker with the difference of price. The recorder [illegible] objected to, but the objection overruled. If the selling broker

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ASSUMPSIT for the work and labor, etc., of plaintiffs done and bestowed by them as the brokers and agents of and for defendant on his retainer and at his request, and for commission and reward due from defendant to plaintiffs in respect thereof. Counts for money paid, and on an account stated. Plea, non-assumpsit. On the trial before Lord Denman, C. J., at the sittings in London after last Hilary term, the following facts appeared: The defendant had employed the plaintiffs as brokers and had dealings with them in stock and shares for three or four years. On May 28, 1838, he gave directions to the plaintiffs to sell for him 250 shares in the South Australian Company. They accordingly, on May 29th, sold 109 such shares to Wells, a broker, and advised defendant thereof by letter of that day; and on May 30th they sold Wells 100 more such shares. On the same day the defendant came to the plaintiffs' counting-house and said that there had been a mistake and that he had intended only to sell fifty shares. He, in fact, had not the number sold by the plaintiffs. On the following day one of the plaintiffs, Mr. Robert Sutton, had an interview with the defendant when, as was stated in evidence, the latter said "he had got into a difficulty." Sutton said, "it was an unfortunate mistake." Defendant asked if the bargain could not be made void? Sutton said "No." Defendant then said "he must leave the matter in their hands to do the best they could." Plaintiffs, on the 31st, applied to Wells to cancel the bargain, informing him of the mistake, but he declined, saying it was too late. The stock exchange is governed by rules of a committee which are in print, and one of them is, that if the selling broker is not prepared to fulfil his contract the purchaser may buy in shares to make up the deficiency, and charge the selling broker with any loss by difference of price. The reception of this rule in evidence was objected to, but the objection overruled. If the selling broker

refuses to make up the difference he is liable to be expelled from the stock exchange. According to the usage no principal is named by the broker on either side. The plaintiffs being unable to complete their contract, Wells bought in shares, according to the rule, on the best terms in his power, and there being a loss on the transaction, the plaintiffs repaid this, and broker's commission for the purchase, to Wells, on his demand. The present action was brought to recover this amount, and the plaintiffs' brokerage on the sale of the shares to Wells. Sir F. Pollock, for the defendant, cited Child v. Morley, 8 T. R. 610, as shewing that a broker having voluntarily made a payment in obedience to the rules of the stock exchange, could not hold his principal, a stranger to those rules, responsible for the amount. Lord Denman, C. J., thought that in this case the principal was answerable, but as to the loss on the second purchase, he left it to the jury to say whether the bargain for that purchase was made within a reasonable time after the mistake was discovered; intimating his own opinion that the plaintiffs were only entitled to recover the commission, inasmuch as they did not appear to have done the best in their power for the defendant as to the repurchase. Verdict for the plaintiffs for 52*l* 5*s*., the amount of the two commissions.

Sir F. Pollock now moved for a new trial on the ground of misdirection. The defendant must lose the commission on the sale to Wells, that sale having been the result of his own mistake. But the plaintiffs are not entitled to commission on the repurchase, if by greater diligence, they could have procured the sale to be cancelled; and at all events they might have left the defendant, who was not amenable to the rules of the stock exchange, to adjust it for himself. If they have thought proper to comply with those rules, by which no principals are known, and brokers who have contracted to sell must, under certain penalties deliver the amount contracted for, the defendant, who is not cognizant of the rules, ought not to bear the consequences of such compliance. The language of the judges, particularly that of Lawrence, J., in Child v. Morley, is strongly in the defendant's favor. (Lord Denman, C. J. I think a person employing one who is notoriously a broker must be taken to authorize his acting in obedience to the rules of the stock exchange. Patterson, J. Did the defendant desire to have the purchaser's name given to him? Lord Denman, C. J., stated the evidence on this point, as above.)

Littledale, J. C.—A person who employs a broker must be supposed to give him authority to act as other brokers do. It does not matter whether or not he himself is acquainted with the rules by which brokers are governed.

Patteson and Coleridge, Js., concurred.

Per Curiam.

Rule refused.[1]

[1] "If there is a general usage, applicable to a particular profession, parties

LeROY v. BEARD.

1850. Supreme Court of the United States. 8 How. 451.

Action by Beard against LeRoy and wife on a covenant of warranty contained in a deed made by their agent Starr. LeRoy and wife denied Starr's authority to make a covenant of warranty for them, there being no express authority to do so in the letter of attorney by which Starr was appointed. Verdict and judgment for plaintiff below. Defendants allege error.[1]

Woodbury, J.—[2] * * * The next instruction to which the original defendant objected, and which is the chief and most difficult one that can properly be considered by us, under the present bill of exceptions, is that the power of attorney by LeRoy and his wife to Starr, their agent, was broad enough to confer upon him "authority to give a deed of the land with covenant of warranty."

This power of attorney is given in *extenso* in the statement of the case. It appears from its contents that LeRoy, after authorizing Starr to invest certain moneys in lands and real estate in some of the western states and territories of the United States, at the discretion of the said Starr, empowered him "to contract for the sale of and to sell, either in whole or in part, the lands and real estate so purchased by the said Starr," and "on such terms in all respects as the said Starr shall deem most advantageous." Again he was authorized to execute "deeds of conveyance necessary for the full and perfect transfer of all our respective right, title," etc., "as sufficiently in all respects as we ourselves could do personally in the premises," "and generally as the agent and attorney of the said Jacob LeRoy" to sell "on such terms in all respects as he may deem most eligible."

It would be difficult to select language stronger than this to justify the making of covenants without specifying them *eo nomine*. When this last is done no question as to the extent of the power can arise, to be settled by any court. But when, as here, this last is not done, the extent of the power is to be settled by the language employed in the whole instrument (4 Moore 448), aided by the situation of the parties and of the property, the usages of the country on such subjects, the acts of the parties themselves, and any other circumstance having a legal bearing and throwing light upon the question. * * *

employing an individual are supposed to deal with him according to the usage." Best, C. J., in Sewall v. Corp, 1 C. & P. 392, 393.

"A general custom is the common law itself, or a part of it. * * * It would seem, however, that upon principle, for a party to be bound by a local usage, or a usage of a particular trade or profession, he must be shown to have knowledge or notice of its existence." Folger, J., in Walls v. Bailey, 49 N. Y. 464, 471, 473.

See particularly Day v. Holmes, 103 Mass. 306.

[1] The reporter's statement of facts is condensed.

The usages of this country are believed, also, to be very uniform to insert covenants in deeds. In the case of the Lessee of Clarke v. Courtney, 5 Peters (U. S.) 349, Justice Story says: "This is the common course of conveyances," and that in them "covenants of title are usually inserted." See also, 6 Hill (N. Y.) 338. Now, if in this power of attorney no expression had been employed beyond giving an authority to sell and convey this land, saying nothing more extensive or more restrictive, there are cases which strongly sustain the doctrine that, from usage, as well as otherwise, a warranty by the agent was proper and would be binding on the principal.

It is true that some of these cases relate to personal estate, and some, perhaps, should be confined to agents who have been long employed in a particular business, and derive their authority by parol, no less than by usage, and consequently may not be decisive by analogy to the present case. 3 T. R. 757; Helyear v. Hawke, 5 Es. Ca. 72, note; Pickering v. Busk, 15 East 45, 2 Camp N. P. 555, 6 Hill (N. Y.) 338, 4 T. R. 177.

So of some cases which relate to the quality and not to the title of property. Andrews v. Kneeland, 6 Cowen (N. Y.) 354; The Monte Allegre, 9 Wheat. (U. S.) 648, 6 Hill (N. Y.) 338.

But where a power to sell or convey is given in writing, and not aided, as here, by language conferring a wide discretion, it still must be construed as intending to confer all the usual means or sanction, the usual manner of performing what is intrusted to the agent. 10 Wend. (N. Y.) 218; Howard v. Baillie, 2 H. Bl. 618; Story on Agency, p. 58; Dawson v. Lawly, 5 Es. Ca. 65; Ekins v. Maclish, Ambler, 186, Salk. 283; Jeffrey v. Bigelow, 13 Wend. (N. Y.) 527, 28 Am. Dec. 476, 6 Cowen (N. Y.) 359. Nor is the power confined merely to "usual modes and means," but, whether the agency be special or general, the attorney may use appropriate modes and reasonable modes; such are considered within the scope of his authority. 6 Hill (N. Y.) 338; 2 Pick. (Mass.) 345; Bell on Com. L. 410; 2 Kent's Com. 618; Vanada v. Hopkins, 1 J. J. Marsh (Ky.) 287, 19 Am. Dec. 92; Sandford v. Handy, 23 Wend. (N. Y.) 268. We have already shown that, under all the circumstances, a covenant of warranty here was not only usual, but appropriate and reasonable.[2] * * *

The judgment below is affirmed.[3]

[2] A portion of the opinion is omitted.

[3] Regarding the custom to warrant machinery see McCormick v. Kelly, 28 Minn. 135.

LORD v. HALL.

Action. Costs of Counter Claim. R. G. T. 1853.

Affidavits. The first count of the declaration alleged that the testator, on the 31st of May, 1852, made his promissory note in writing, whereby he promised to pay to the order of Isaac Shuttleworth the sum of [illegible] three months after the date thereof, and delivered the same to the said Joseph Shuttleworth, and that [illegible] the said note to the plaintiff, etc.

The plea, that the said Joseph Shuttleworth did not deliver the said promissory note to the said testator.

The cause was tried before V. Williams, J., at the [illegible] Assizes for Surrey, when it appeared that Shuttleworth [illegible] was indebted to the testator in the sum of [illegible] and upwards, after things, drawing, and [illegible] the note in question, and delivering it to the testator, in the presence of his daughter and another, and that it was then delivered to the plaintiff.

On the defendant's case it was alleged that the note in question was found in the defendant's box, that the testator had given it as a present to his daughter, and that [illegible]

The learned judge overruled the objection, and directed a verdict for the plaintiff for £[illegible], the amount of the note and interest, leave to the defendant to move to enter a verdict for him, if the court should think the evidence of delivery was sufficient.

Shuttleworth obtained a rule nisi, against which Prideaux showed cause.

If the fact that Shuttleworth's husband was possessed of the note, does not vest in the holder a prima facie title, and serve in his favour, and cast the burden of [illegible] on the plaintiff. The endorsement by the daughter [illegible] in the presence of her mother, was [illegible] the [illegible] was [illegible] prima facie evidence. This would be a [illegible] of a delegated authority. Suppose [illegible] accidental sense, [illegible] with her own hand, could it be said that [illegible] the hand of another person was [illegible] act of the [illegible] hand, [illegible] a gift or note, and her [illegible] [illegible] [illegible] [illegible]

LORD v. HALL.

1849. COURT OF COMMON PLEAS. 8 C. B. 627.

ASSUMPSIT. The first count of the declaration alleged that the defendant, on the 3d of May, 1844, made his promissory note in writing, and thereby promised to pay to the order of Joseph Shuttleworth the sum of £251, three months after the date thereof, and delivered the same to the said Joseph Shuttleworth, and that Joseph Shuttleworth endorsed the same to the plaintiff, etc.

Second plea, that the said Joseph Shuttleworth did not endorse the note *modo et forma;* whereupon the issue was joined.

The cause was tried before V. Williams, J., at the first sitting at Westminster, in Trinity term last. It appeared that Shuttleworth was a mathematical instrument maker; that his wife was in the habit of managing all his affairs, and, amongst other things, drawing, accepting, and endorsing bills in his name, and that the note in question was endorsed by Shuttleworth's daughter, in his name, in the presence and by the direction of her mother, and that it was then delivered by the latter to the plaintiff.

On the part of the defendant it was insisted that the issue on the endorsement must be found for the defendant; for, that the mother had no right thus to delegate to her daughter the authority to endorse.

The learned judge overruled the objection, and directed a verdict for the plaintiff for £31 10s., the amount of the note and interest, reserving leave to the defendant to move to enter a verdict for him on the second issue, if the court should think the endorsement by Shuttleworth was not well proved.

Humfrey accordingly obtained a rule *nisi,* against which Whitehurst now showed cause.

It appeared at the trial that Shuttleworth's business was generally managed by his wife; that she was in the habit of drawing, accepting, and endorsing bills and notes in his name; and that she, having previously by the hand of her daughter endorsed the note in question, delivered it to the plaintiff. The endorsement by the daughter by the direction and in the presence of her mother, was clearly the act of the latter. *Qui facit per alium facit per se.* This is not, as suggested, a delegation of a delegated authority. Suppose Mrs. Shuttleworth, from some accidental cause, were rendered unable to make the endorsement with her own hand, could it be said that she was precluded from using the hand of another person for that purpose? A recognition of an act of an agent binds the principal. Where a man hands over a bill or note, with his acceptance or endorsement upon it, he is estopped from afterwards saying that the acceptance or endorsement is not his; and here Shuttleworth would

be estopped from denying his endorsement, by the act of his acknowledged agent in delivering over the note, endorsed, to the plaintiff.

Humfrey, in support of his rule:

The note is handed over by Mrs. Shuttleworth to the plaintiff, with an unauthorized, a forged, endorsement by the daughter. How can the defendant be estopped, by something done to the note after it had passed out of his hands, from denying that the endorsement was the endorsement of Shuttleworth?

(MAULE, J.—Shuttleworth was estopped; he has done something which amounts to an order. If the endorsement by the daughter was made under the authority of the father, it is no forgery. The substantial right of the defendant is, to be secure that he pays the right person. The question is whether this was not really the act of the wife.)

If the wife might lawfully delegate her authority to the daughter in this way, what is there to prevent the daughter delegating it in her turn to another?

(MAULE, J.—It is conceded that one having an authority of this sort cannot delegate it.)

In Toms v. Cuming (1), this court held that a notice of objection under the registration act, 6 & 7 Vict., c. 18, § 17, must be signed by the hand of the party objecting.

(MAULE, J.—Nobody denies the power of the legislature to require a signature by the hand of the party. If the authority given to the wife here was to endorse by all means which would make the endorsement enure as an endorsement by her, this clearly would be an execution by her of that authority, and no delegation.)

To hold that the wife could, by any other hand than her own, exercise the authority confided to her by her husband, would be to lay down a doctrine which will be very embarrassing to commercial transactions.

MAULE, J.—It seems to have been put at the trial, as a question of law, whether the rule, *delegatus non potest delegare*, applied, so as to entitle the defendant to a verdict upon the second issue. It seems to me, however, that this was far from being a correct view of the matter: the maxim has no application at all here. The question is, whether, upon the evidence, the wife was not acting in the strict exercise of the authority conferred upon her by her husband in doing what she did, viz.: in requesting a third person to do it in her presence. There was evidence that the wife had the general management of her husband's business. And when he authorized her to draw, accept and endorse bills in his name, that may fairly be extended to authorizing her to select some person, *pro hac vice*, to write the name of her husband for her. It may be that this will lead to some inconvenience. But, her husband having trusted her to exercise her discretion as to drawing, accepting and endorsing, may be assumed to trust her also to use her discretion to select the hand of another

to carry her intention into effect. I think, and I believe the rest of the court agree with me, that there was evidence for the jury upon this issue; and there could be very little doubt as to the conclusion the jury would come to. I, therefore, think the verdict ought not to be disturbed. I find a case of *Ex Parte* Sutton (1), which may be worth considering in reference to this subject. It was there held that an authority given to A to draw bills in the name of B may be exercised by the clerks of A. The way in which that case seems to me to apply to the present is this, the lord chancellor treats the extent of the authority as a matter of fact, to be inferred from the evidence; and that confirms the view we have taken upon this occasion.

CRESSWELL, J.—I agree with my brother, Maule, that this rule ought not to be made absolute. Both parties seem to have treated the question at the trial as one of law. That was clearly a mistake. It was purely a question for the jury, whether or not the evidence showed an authority given by the husband to the wife to endorse in the way which was adopted here. I am not prepared to say what verdict I should have been disposed to concur in if I had been on the jury. Many reasons might be urged to influence a decision either way. The authority of an agent ought not to be unduly extended.

The rest of the court concurring.

Rule discharged.

HAZELTINE v. MILLER.

1857. SUPREME JUDICIAL COURT OF MAINE. 44 Me. 177.

THIS is an action of assumpsit upon an agreement signed "Wm. R. Miller, agent," and was defended upon the ground that he had no authority to bind the defendant by an agreement for such purposes as are embraced therein.

CUTTING, J., presiding at *nisi prius*, ordered a nonsuit, to which, and to the rejection of certain evidence, the plaintiff excepted.

The facts most favorably stated for the plaintiff are just these: The defendant owned certain mills and land connected therewith, in the town of Howland. William R. Miller had rented the mills and sold stumpage from the land. Now did that authorize William R. to make a contract for the defendant, to have lumber cut and hauled, and on other land? He never had even made such a contract on the mill land. He had sold, but never bought.

The question is not whether there is evidence tending to show, but is the plaintiff's testimony sufficient to authorize a verdict?

There is not even testimony, taken by itself, tending to show an authority. If there is, there will be too much danger for one man even to employ another.

The key to this case does not appear, as the defense was not

reached, but it may be stated as a supposition, and will test the plaintiff's pretension.

There is not a particle of testimony in this case showing any authority in William R. Miller to bind the defendant to pay money—to make contracts to pay money—to assume responsibilities. Such an inference of a general agency would be destructive of all business delegation of authority.

There is no evidence of a general agency. It is not every act of employment which renders a party an agent. A clerk with authority to sell goods has no authority to buy goods, and give his employer's note. Nor does an authority in this case, to rent mills and rent lands, authorize William R. Miller to make a contract foreign to renting mills and lands.

Here was a mere limited authority for certain definite purposes. For appropriate illustrations, see cases of Webber v. Williams College, 23 Pick. R. 302; Nash v. Drew, 5 Cush. R. 424; Tabor v. Cannon, 8 Met. R. 456; Calef v. Foster, 32 Maine R. 92.

The testimony was rightly rejected. The plaintiff could call William R. Miller as a witness.

Rice, J.—No rule of law is better established, or more universally recognized, than that the authority of an agent, to act for, and bind, his principal, will be implied from the fact that such agent has been accustomed to perform acts of the same general character for that principal, with his knowledge and assent. Nor is it necessary, in order to constitute a general agent, that he should have done before an act the same in specie with that in question. If he have usually done things of the same general character and effect, with the assent of his principal, that is enough. Thus it was held in Bank of Lake Erie v. Norton, 1 Hill R. 502, where, by articles of co-partnership, one Norton was created agent of a firm, but his authority, as thereby defined, did not extend to accommodation acceptances. It was proved, however, that he was the general agent of the firm, and with their knowledge and assent, was in the habit of drawing bills and making notes and endorsements for them; though the specific act of acceptance was not mentioned in the evidence, as one that had been usually done, the court decided that his general power, and the usage of putting the firm name to commercial paper, in all other shapes, was the same thing, in substance, and calculated to raise an inference in the public mind that he had such a power.

But the acts from which authority to do a specific act can be implied must be of the same general character and effect. Thus it was held in Tabor v. Cannon, 8 Met. R. 456, that an agent who is employed by the owners of a whale ship, to fit her for sea and purchase the necessary supplies for her voyage, cannot bind the owners by making a negotiable note, or accepting a negotiable bill of exchange in their names, as agent, in payment for such supplies. The court, in their opinion, remark, there is good reason for this distinction. In

a contract of sale, the owners can be liable to no one but the actual sellers of the goods; the consideration may be inquired into; all the circumstances attending the sale may be shown; and all payments and offsets may be adjusted; all which would be precluded if an action could be maintained by the endorser on an acceptance.

In Webber v. Williams College, 23 Pick. R. 302, which was on a note given by Mr. Fessenden, of Portland, as agent for the defendants. Mr. F. was agent for the defendants, at Portland, to manage some interests of theirs growing out of some eastern lands. To avoid an apprehended troublesome controversy, Mr. Fessenden was authorized to advance to a Mr. Ingersoll one or two hundred dollars, to assist him in paying off a large highway tax. Instead of advancing the money, Mr. Fessenden gave the note in suit. The court held that the note was made without authority and was not binding on the defendants.

A general authority to an agent to collect debts, and to pay and receive money, does not authorize him to bind his principal by negotiable instruments; such an authority must be expressly conferred or reasonably implied from the nature of the business to be done. Rossiter v. Rossiter, 8 Wend. R. 496.

In the case at bar, the evidence shows satisfactorily that W. R. Miller was an agent for the defendant. That in that capacity he carried on his mills, at the mouth of the Piscataquis; that he paid the taxes on the defendant's property; that he gave permits for cutting timber on the defendant's lands in Howland and Edinburgh, and collected the stumpage therefor; that he settled and received pay for lumber cut upon the defendant's land without authority. There was also evidence that on one occasion he gave a note to the town of Howland, as the agent of the defendant. There is no evidence, however, that he had any authority to give that note, or that the defendant had any knowledge of its existence till long after it was given, or that he has ever recognized it as a valid note against him.

Now there is a wide distinction between authority in an agent to carry on mills for the owner; to permit parties to cut timber on his lands, and collect stumpage therefor; to claim indemnity from trespassers; and authority to enter into contracts for carrying on lumbering operations, by which the principal was to be obligated to pay large sums of money. In the one case the agent would be, in different modes, collecting for his principal money arising from the use or proceeds of the sales of his property; in the other, he would be embarking that principal in business enterprises which might involve large pecuniary liabilities and losses. Authority to embark in enterprises of the latter description could not be implied from an admitted agency, with authority to perform acts of the former character.

As to the testimony of the witness, Muzzey, taken in connection with the letter of the defendant, it restricts rather than enlarges the authority of W. R. Miller, as the agent of the defendant. No implica-

tion of authority to enter into the contract in question can arise from that transaction.

The declarations of W. R. Miller were properly rejected. There must be proof of agency before the declarations of the alleged agent are admissible in any case; and then only such declarations as are strictly part of the *res gestæ*. There being no proof of authority in the agent to perform the principal act, his declarations, while in the performance of that act, are, as matter of course, inadmissible.

It may well be doubted whether, by the terms of the instrument itself, any persons other than the plaintiff and William R. Miller are bound by it. But as this point was not raised in the arguments of the counsel, we express no opinion upon it. The nonsuit must stand.

Exceptions overruled.[1]

STAR LINE OF STEAMERS v. VAN VLIET.

1880. Supreme Court of Michigan. 43 Mich. 364.

Assumpsit. Defendant brings error.

Graves, J.—The Star Line of Steamers is a corporation organized under Chapter 83 of the Compiled Laws, and at a meeting of the stockholders, two of their number, Messrs. Toulmin and Ketchum, were appointed a committee to employ two expert accountants to investigate the affairs, books and accounts of the company, and report the results. Mr. Toulmin engaged the defendant in error and agreed that his compensation should be graduated by allowing a certain sum per hour for himself and a certain other amount for an assistant. At least such seems to be a fair construction of the arrangement, and it is the construction which the court below put upon it. The company were aware he was prosecuting the business and made no objection, and Mr. Ketchum expressed his assent and concurrence by joining with Mr. Toulmin in a written approval and acceptance of what had been done under the employment. The company refusing to pay, the defendant in error sued and was allowed to recover the price promised.

Errors are assigned on several exceptions to evidence, but none are considered of sufficient merit to require discussion.

The court assumed that the resolution appointing the committee was a valid act of the corporation, and this is excepted to. The court did not err. The resolution was shown from the records of the corporation, and there was no evidence tending to impeach it. It purported to be a legal expression of the sense of the body of stockholders, and so stood upon the corporation records.

[1] An agent employed by a railroad company to solicit passengers cannot bind the company by a contract to receive or transport freight. Taylor v. Chicago & N. W. R. R. Co., 74 Ill. 86.

Generally, no doubt, a stockholders' meeting would not be authorized to contract on such subjects, the ordinary management being with the directors; but as the purpose here was in part at least to investigate what had been done under the superintendence of the directors, it was competent for the holders of a majority of the stock to do what was done. Comp. L., § 2682. There is no ground on which the corporation can urge an intendment against the validity of the resolution, and arbitrarily deny its regularity and force. In view of the facts presented, every presumption is the other way. There was no offer of proof that the stockholders present at the meeting did not hold a majority of the stock, and there was some evidence tending to show that the directors were aware of the proceeding and acquiesced.

The court left it to the jury to say whether Ketchum, the second member of the committee, concurred in Van Vliet's employment, and they found that he did. There was evidence warranting this submission; and not only so, the proposition scarcely admitted any other answer than the jury gave.

The power conferred on the committee implied a right to agree upon the price to be paid for the service. The committee were to employ experts. The end thus required implied authority to use the proper means, and it could not have been supposed that competent accountants would be found to enter on such an undertaking without some understanding concerning the rate of compensation. The arrangement for clerical assistance was reasonable. If none had been made the defendant in error no doubt might have hired a clerk, and no reason is perceived why it was not proper to adjust the compensation with an eye to such help. Without it the expense to the company would probably have been greater still. It is not worth while to discuss other points.

The case was fairly submitted and no ground is seen for disturbing the result.

The judgment should be affirmed with costs.

The other justices concurred.[1]

[1] In Dawson v. Lawley, 4 Esp. 65, it was decided that an authority to pay an award includes the power to carry the award into effect by executing a release.

In Morgan v. Brown, 12 La. Ann. 159, it was held that an authority to "sue or otherwise collect all claims" included the power to employ counsel to bring suit on the claims.

"The act of an agent, whose duty it is to collect money due his principal, is authorized only to resort to such proceedings as are usual and legitimate for the purpose. Civil proceedings would be deemed such, but not the use of criminal process. This is not appropriate or justified in order to collect a debt." James, C. J., in Equitable Life Ass. Soc. v. Lester (Tex.), 110 S. W. 499, 501.

TERRE HAUTE AND INDIANAPOLIS R. R. CO. v. McMURRAY.

1884. SUPREME COURT OF INDIANA. 98 Ind. 358.

ELLIOTT, C. J.—The facts in this case are simple, and lie within a narrow compass; but the questions of law are important and difficult.

Frankfort is a way station in the line of appellant's road, distant many miles from the principal offices of the company and from the residences of its chief officers. At this station at one o'clock of the morning of July 2, 1881, Thomas Coon, a brakeman in the service of the appellant, had his foot crushed between the wheel of a car of the train on which he was employed as a brakeman, and a rail of the track. The injury was such as demanded immediate surgical attention. The conductor of the train requested the appellee, who was a surgeon, residing in the town of Frankfort, to render the injured man professional aid, and informed the appellee that the company would pay him for such services. At the time the accident happened, and at the time the surgeon was employed, there was no officer superior to the conductor at the town of Frankfort. There was at the station a resident agent who had full knowledge of the injury to Coon and of appellee's employment. This agent was in telegraphic communication with the principal officers of the company, but did not communicate with them. The trial court held the appellant liable for the reasonable value of the services rendered by the appellee, and awarded him $100.

In ordinary cases, a conductor or other subordinate agent has no authority to employ surgical assistance for a servant of the corporation who receives an injury or becomes ill. We do not doubt that the general rule is that a conductor has no authority to make contracts with surgeons, and if this principle governs all cases the discussion is at an end; but we do not think it does rule every case, for there may be cases so strongly marked as to constitute a class in themselves and one governed by a different rule.

The authority of an agent is to be determined from the facts of the particular case. Facts may exist which will greatly broaden or greatly lessen an agent's authority. A conductor's authority in the presence of a superior agent may dwindle into insignificance, while in the absence of a superior it may become broad and comprehensive. An emergency may arise which will require the corporation to act instantly, and if the conductor is the only agent present, and the emergency is urgent, he must act for the corporation, and if he acts at all, his acts are of just as much force as that of the highest officer of the corporation. In this instance the conductor was the highest officer on the ground; he was the sole representative of the corporation; he it was upon whom devolved the duty of representing the

TERRE HAUTE AND [illegible] R. R. CO. v. [illegible]

1894. Supreme Court of Indiana. 138 Ind. 358.

[illegible] C. J. The [illegible] case are simple, and lie within a narrow [illegible] are important and difficult.

[illegible] the line of appellant's road, distant many miles [illegible] offices of the company and from the residences [illegible] At this station at one o'clock of the morning [illegible] Crum, a brakeman in the service of the appellant [illegible] passed between the wheel of a car of the train [illegible] knocked down as a spectator, and a rail of the track [illegible] so demanded immediate surgical attention. [illegible] the train requested the appellee, who was a [illegible] town of Evansville, to render the injured [illegible] informed the appellee that the company [illegible] At the time the accident happened, [illegible] employing, there was no officer su[illegible] town of Evansville. There was at the [illegible] had full knowledge of the injury to [illegible] This agent was an [illegible] paid officers of the company, but did [illegible] The trial court held the appellant [illegible] of the services rendered by the appellee [illegible]

[illegible] or other subordinate agent has no [illegible] authority [illegible] a servant of the corporation who [illegible] becomes ill. We do not doubt that the [illegible] conductor has no authority to make contracts [illegible] for physicians' services [illegible] We think it does rule every case [illegible] where [illegible] marked as to constitute a class in [illegible] a different rule.

[illegible] developments from the facts of the particular case [illegible] which will greatly broaden or greatly restrict [illegible] A conductor's authority in the presence of a [illegible] is little less than absolute, while in the absence of [illegible] become broad and comprehensive. An emergency [illegible] will require the corporation to act instantly, and [illegible] the only agent present, and the emergency is urgent [illegible] the corporation, and if he acts at all, his [illegible] as that of the highest officer of the corporation [illegible] the conductor was the highest officer on the [illegible] was not [illegible] representative of the corporation; he [illegible] duty of representing the

corporation in matters connected within the general line of his duty in the sudden emergency which arose out of the injury to the fellow-servant immediately under his control; either he, as the superior agent of the company, must, in such cases, be its representative, or it has none. There are cases where the conductor is the only representative of the corporation that in the emergency it can possibly have. There are cases where the train is distant from the supervision of superior officers, where the conductor must act, and act for the company, and where, for the time, and under the exigencies of the occasion, he is its sole representative, and if he be its only representative, he must, for the time and the exigency, be its highest representative. Simple examples will prove this to be true. Suppose, for illustration, that a train is brought to a halt by the breaking of a bolt, and that nearby is a mechanic who can repair the broken bolt and enable the train to proceed on its way, may not the conductor employ the mechanic? Again, suppose a bridge is discovered to be unsafe, and that there are timbers at a neighboring mill which will make it safe, may not the conductor, in behalf of his principal, employ men to haul the timber to the bridge? Once more, suppose the engineer of a locomotive to be disabled, and that it is necessary to at once move the train to avoid danger, and there is nearby a competent engineer, may not the conductor employ him to take the train out of danger? In these examples we mean to include, as a silent factor, the fact that there is an emergency, allowing no time for communicating with superior officers, and requiring immediate action. If it be true that there are cases of pressing emergency where the conductor is on the special occasion the highest representative of the company, then it must be true that he may do, in the emergency, what the chief officer, if present, might do. If the conductor is the only agent who can represent the company, then it is inconceivable that he should, for the purposes of the emergency, and during its existence, be other than the highest officer. The position arises with the emergency, and ends with it. The authority incident to the position is such, and such only, as the emergency imperatively creates.

Assuming, as we may justly do, that there are occasions when the exigency is so great, and the necessity so pressing, that the conductor stands temporarily as the representative of the company, with authority adequate to the urgent and immediate demands of the occasion, we inquire what is such an emergency as will clothe him with this authority and put him in the position designated. Suppose that a locomotive is overturned upon its engineer, and he is in immediate danger of great bodily harm, would it not be competent for the conductor to hire a derrick, or a lifting apparatus, if one were near at hand, to lift the locomotive from the body of the engineer? Surely some one owes a duty to a man, imperiled as an engineer would be in the case supposed, to release him from peril, and is there any one

upon whom this duty can be so justly put as upon his employer? The man must, in the case supposed, have assistance, and do not the plainest principles of justice require that the primary duty of yielding assistance should devolve upon the employer rather than on strangers. An employer does not stand to his servants as a stranger, he owes them a duty. The cases all agree that some duty is owing from the master to the servant, but no case that we have been able to find defines the limits of this duty. Granting the existence of this general duty, and no one will deny that such a duty does exist, the inquiry is as to its character and extent. Suppose the axle of a car to break because of a defect, and a brakeman's leg to be mangled by the derailment consequent upon the breaking of the axle, and that he is in imminent danger of bleeding to death unless surgical aid is summoned at once, and suppose the accident to occur at a point where there is no station and when no officer superior to the conductor is present, would not the conductor have authority to call a surgeon? Is there not a duty to the mangled man that some one must discharge? and if there be such a duty, who owes it, the employer or a stranger? Humanity and justice unite in affirming that some one owes him this duty, since to assert the contrary is to affirm that upon no one rests the duty of calling aid that may save life. If we concede the existence of this general duty, then the further search is for the one who in justice owes the duty, and surely, where the question comes between the employer and a stranger, the rule must be that it rests upon the former.

Authorities upon the question we are discussing are far from abundant. In the case of Marquette, etc., R. R. Co. v. Taft, 28 Mich. 289, a laborer in the service of the company was struck and injured by one of its trains, and the yardmaster and the superintendent employ a surgeon, and the court divided on the question of the company's liability, Graves and Campbell, JJ., denying its liability and Cooley, J., and Christiancy, C. J., affirming that it was liable to the surgeon. One opinion was written by Graves, J., and proceeds on the broad ground that no officer of the company could bind it to pay for surgical services rendered an employe. That case is, however, distinguishable from the present, even upon the theory adopted in the opinion of Judge Graves, for in this case there was an immediate necessity for surgical aid, while in the one cited there is not shown to have been any such necessity. Judge Cooley's opinion is a model of judicial reasoning, and forcibly maintains the duty of the railway companies to provide surgical aid for its servants in cases of accidents incident to their employment. In one place he says: "We think it their duty to have some officer or agent, at all times, competent to exercise a discretionary authority in such cases, and that on grounds of public policy they should not be suffered to do otherwise." At another place he says: "We shall not stop to prove that there is a strong moral obligation resting upon any one engaged in

a dangerous business, to do what may be immediately necessary to save life or prevent an injury becoming irreparable, when an accident happens to a person in his employ. We shall assume this to be too obvious to require argument." Another extract from this opinion, strongly applicable, is this: "There can be no doubt that it is within the scope of somebody's employment for a railway company to cause a beast which is injured in carriage or run over at a crossing to be picked up and have the attention proper and suitable to its case; and if no one is authorized to do as much for the faithful servant of the company who is in like manner injured, but all persons in its service are impliedly forbidden to incur on its behalf any expense beyond what may be necessary to remove him out of the way of their trains and machinery—even to convey him to his house, or to save his life by binding up a threatening wound—then if such is the law, the courts must not hesitate to apply it, even though it be impossible to avoid feeling that it ought not to be the law, and that no business of this extensive and hazardous nature ought to be suffered to be carried on with no one for the major part of the time empowered to recognize and perform a duty which, at least on moral grounds, is so obvious and imperative. But we do not think such is the law."

In the case of Northern Central R. Co. v. State, 29 Md. 420, it was held that it was the duty of agents in charge of a railroad train to take care of one injured by a collision, and to do it with a proper regard to his safety and the laws of humanity.

It was held in Walker v. Great Western R. W. Co., L. R. 2 Exch. 228, that the general manager of the company had authority to employ a surgeon for a servant injured in the company's service. Chief Baron Kelly, in the course of the argument, inquired: "Must a board be convened before a man who has both his legs broken can have medical assistance?" See 36 Law Journal (C. L.) 123.

In Swazey v. Union Manufacturing Co., 42 Conn. 556, the court held that the business manager of a manufacturing corporation had authority to employ surgical aid for a lad who had received an injury in its service.

In Atlantic, etc., R. R. Co. v. Reisner, 18 Kan. 458, the holding was that the general agent of a railroad company was authorized to employ a surgeon to attend one of the brakemen injured while in the service of the company. The court said, in the course of the opinion: "In other words, the general agent of the company is virtually the corporation itself." This is necessarily true in cases where the agent is required to act for the corporation, and is also true where the agent who acts is the highest agent of the corporation present, although he may not be the general agent of the corporation. A corporation can act, and can be present, only by its agent, and when it must act and must be present at a particular time and place, then it is present, and does act, through the highest agent who is on the ground. If the agent represents the corporation by authority, then, so far as

he represents it in the particular manner, he is, in law, the corporation, for through him it is present and acting. If, then, the conductor is the highest agent on the ground, and the corporation must and does act, his act is just as much that of the corporation in the particular instance, and circumscribed by the exigencies of the special occasion, as though he were much higher in authority. The ruling in Atchison, etc., R. R. Co. v. Reecher, 24 Kan. 228, is that the general superintendent of a railroad company has authority to employ a surgeon to attend a man injured while in its service. The cases of Toledo, etc., R. W. Co. v. Rodrigues, 47 Ill. 188; Toledo, etc., R. W. Co. v. Prince, 50 Ill. 26; Indianapolis, etc., R. R. Co. v. Morris, 67 Ill. 295; Cairo, etc., R. R. Co. v. Mahoney, 82 Ill. 73, cited and relied on by the appellant, all recognize the doctrine that the superintendent or general agent has authority to employ a surgeon to treat a servant who has been injured. If we are right in our conclusion that an emergency may arise which will constitute a conductor, for the time and the emergency, the chief officer of the corporation present, then these cases are strongly in support of our position that he may, in cases of urgent necessity, bind the corporation by contracting with the surgeon. For, once it is conceded that the officer having a right to represent the company is the company, it inevitably follows that his contract is that of the corporation. These cases do deny, however, in general terms, the authority of a station agent or conductor to employ a surgeon, but they affirm that if the superintendent has notice of the services rendered by the surgeon, and does not disavow the agent's acts, the company will be bound. It is to be noted that in all of these cases the company was held liable on the ground of ratification by the superintendent, and there was really no decision of any other question than that a failure of the superintendent to disavow the contract of the conductor or station agent rendered the company liable. There was no discussion of the authority of a conductor in cases of immediate and urgent necessity. The reasoning of the court in these cases strongly indicates that the act of the superior officer, whoever he may be, on the occasion and under the emergency, would be deemed the act of the corporation which he assumes to represent. In the last of these cases it is said: "While a railroad company is under no legal obligation to furnish an employe, who may receive injuries while in the service of the company, with medical attendance, yet, where a day laborer has, by an unforeseen accident, been rendered helpless when laboring to advance the prosperity and the success of the company, honesty and fair dealing would seem to demand that it should furnish medical assistance." If it be conceded that honesty and fair dealing require that medical assistance should be furnished, then the law requires it, for the law always demands honesty and fair dealing. It would be a cruel reproach to the law, and one not merited, to declare that it denied to an injured man what honesty and "fair dealing require."

If it should appear that a man had been denied what honesty and fair dealing required of his master, and death should result, it would seem clear, on every principle of justice, that the master would be responsible for the servant's death. Of course, this duty could not rest upon the master in ordinary cases, but should rest upon him in extraordinary cases, where immediate medical assistance is imperatively demanded. The case of Tucker v. St. Louis, etc., R. W. Co., 54 Mo. 177, does decide that a station agent has no authority to employ a surgeon, but no element of pressing necessity entered into the case. There is no authority cited in support of the opinion, nor is there any reasoning. All that is said is: "It is only shown that they [the station agent and the conductor] were agents of defendant in conducting its railroad business, which of itself could certainly give them no authority to employ physicians, for the defendant, to attend to and treat persons accidentally injured on the roads." It may be that this statement is true in ordinary cases, but when we add the element of immediate and pressing necessity, a new and potent factor is introduced into the case. A brief opinion was rendered in Brown v. Missouri, etc., R. W. Co., 67 Mo. 122, declaring that the superintendent of the company could not bind the company for "a small bill of drugs furnished a woman who had been hurt by the locomotive or cars of the defendant." It may be said of the last cited case that it presented no feature of emergency requiring prompt action, and for aught that appears in the meager opinion of a very few lines, there may have been no necessity for action. But it is further to be said of it, that if it is to be deemed as going to the extent of denying the right of one of the principal officers to contract for medicine in a case of urgency, it finds no support from any adjudged case. The case of Mayberry v. Chicago, etc., R. R. Co., 75 Mo. 492, is not in point, for there a physician employed to render medical aid, and employed for no other purpose, undertook to contract for boarding for an injured man.

The learned counsel for appellant says, in his argument: "In several of these cases the court takes occasion to say that humanity, if not strict justice, requires a railroad company to care for an employe who is injured without fault on his part in endeavoring to promote the interests of the company. Whilst this may be true, I think humanity, and strict justice, too, would at least permit the company to adopt the proper means for exercising the required care and of determining the cases wherein it ought to be exercised."

It seems to us that while the concession of the counsel is required by principle and authority, his answer is far from satisfactory. Can a man be permitted to die while waiting for the company to determine when and how it shall do what humanity and strict justice require? Must there not be some representative of the company present in cases of dire necessity to act for it? The position of counsel will meet ordinary cases, but it falls far short of meeting cases where

there is no time for deliberation, and where humanity and justice demand instant action. From whatever point of view we look at the subject we shall find that the highest principles of justice demand that a subordinate agent may, in the company's behalf, call surgical aid, when the emergencies of the occasion demand it, and when he is the sole agent of the company in whose power it is to summon assistance to the injured and suffering servant. Humanity and justice are, for the most part, inseparable, for all law is for the ultimate benefit of man. The highest purpose the law can accomplish is the good of society and its members, and it is seldom, indeed, that the law refuses what humanity suggests. Before this broad principle bare pecuniary considerations become as things of little weight. There may be cases in which a denial of the right of the conductor to summon medical assistance to one of his trainmen would result in suffering and death; while, on the other hand, the assertion of the right can, at most, never do more than entail upon the corporation pecuniary loss. It may not do even that, for prompt medical assistance may, in many cases, lessen the loss to the company by preventing loss of life or limb.

The authority of a conductor of a train, in its general scope, is known to all intelligent men, and the court that professes itself ignorant of this matter of general notoriety avows a lack of knowledge that no citizen who has the slightest acquaintance with railroad affairs would be willing to confess. It is true that the exact limits of his authority cannot be inferred from evidence that he is the conductor in charge of the train, but the general duty and authority may be. This general authority gives him control of the trainmen and of the train, and devolves upon him the duty of using reasonable care and diligence for the safety of his subordinates. The authority of the conductor may be inferred, as held in Columbus, etc., R. W. Co. v. Powell, 40 Ind. 37, from his acting as such in the control of the train, but this inference only embraces the ordinary duties of such an agent. Many cases declare that the conductor, in the management of the train and matters connected with it, represents the company. It is true that the agency is a subordinate one, confined to the subject-matter of the safety of the train and its crew, and the due management of matters connected with it, but although the conductor is a subordinate agent he yet has broad authority over the special subject committed to his charge. It was said in Jeffersonville Ass'n v. Fisher, 7 Ind. 699, that "It is not the name given to the agent, but the acts which he is authorized to do, which must determine whether they are valid or not, when done." In another case it was said: "The authority of an agent being limited to a particular business does not make it special; it may be as general in regard to that, as though its range were unlimited." Cruzan v. Smith, 41 Ind. 288. This subject was discussed in Toledo, etc., R. W. Co. v. Owen, 43 Ind. 405, where it was said: "A general agent is one authorized to transact all

his principal's business or all of his principal's business of some particular kind. A special agent is one who is authorized to do one or more special things, and is usually confined to one or more particular transactions, such as the sale of a tract of land, to settle and adjust a certain account, or the like. That the authority of an agent is limited to a particular kind of business does not make him a special agent. Few, if any, agents of a railroad company do, or can, attend to every kind of business of the company, but to each one is assigned duties of a particular kind, or relating to a particular branch or department of the business." Wharton says: "A general agent is one who is authorized by his principal to take charge of his business in a particular line." Wharton Agency, 117. It results from these familiar principles that the conductor of a train, so far as concerns the direct and immediate management of the train when it is out on the road, is, in the absence of some superior officer, the general agent of the company; but even general agents do not have universal powers, and the authority of such agents is to be deduced from the facts surrounding the particular transaction. 2 Greenl. Ev., §§ 64, 64a. In some instances, then, the conductor is the general agent of the company, and we think it clear upon principle and authority, that he is such an agent for the purpose of employing surgical assistance where a brakeman of his train is injured while the train is out on the road, and where there is no superior officer present, and there is an immediate necessity for surgical treatment. A conductor cannot be regarded as having authority to employ a surgeon when the train is not on the road under his control, or where there is one higher in authority on the ground, or where there is no immediate necessity for the services of a surgeon.

The rule which denies a recovery where there is mutual negligence applies only between the immediate parties. The courts do not extend the rule to cases where the defendant's negligence and that of a third person concur in producing the injury. Thus, if two trains come into collision and the managers of both are negligent, an action may nevertheless be maintained by a passenger. Pittsburgh, etc., R. R. Co. v. Spencer, *ante*, p. 186. So, if a man is riding with another and is injured by a collision occurring through the concurrent negligence of the driver of the vehicle and the servants of a railroad train engaged in running it, he may recover, notwithstanding the contributory negligence of the driver of the vehicle in which he is riding. Town of Albion v. Hettrick, 90 Ind. 545, 46 Am. Rep. 230; Robinson v. New York Cent., etc., R. R. Co., 60 N. Y. 11, s. c. 23 Am. Rep. 1; Wabash, etc., R. Co. v. Shacklet, 105 Ill. 364, s. c. 44 Am. Rep. 791; Masterson v. New York Cent, etc., R. R. Co., 84 N. Y. 247, 38 Am. Rep. 510; Cuddy v. Horn, 46 Mich. 596, s. c. 41 Am. Rep. 178; Bennett v. New Jersey, etc., Co., 36 N. J. 225, s. c. 13 Am. Rep. 435.

The doctrine of contributory negligence is by some authorities

based on the principle that a man must not cast himself into danger, and by others upon the principle that one who is himself in fault cannot invoke assistance from the courts against another who shares the fault with him. Butterfield v. Forrester, 11 East 60; 1 Thompson Neg. 485. Other authorities put the doctrine on the ground that the interests of the whole community require that every one should take such care of himself as can reasonably be expected of him. Shearman & Redf. Neg., § 42. It is obvious that, whatever be deemed the true basis of the doctrine, it cannot apply where the case goes beyond the plaintiff himself, or what, in law, is the same thing, his agent or servant. It is, therefore, plain that where a surgeon sues for professional services rendered at the request of the agent of a railroad corporation, no question of contributory negligence is involved. This is manifestly the practical, just and reasonable rule. It cannot be expected that a surgeon summoned to attend a case of pressing need shall be required to stop and investigate the causes of the accident, and thus take upon himself the functions of judge and jury. It is but just that he should be deemed entitled to rely on the statement of the corporate agent. Where a principal puts it in his agent's power to exercise apparent authority, the man who, in good faith, acts upon the statements of the agent should be protected. Cruzan v. Smith, 41 Ind. 288. The Supreme Court of Kansas, in a case not unlike the present, said: "The defendant in error was not compelled to institute inquiry as to the moral or legal liability of the railroad company to take care of the disabled employe before receiving him into his hotel, after the general agent of the company had agreed that the company would pay for the board and service." Atlantic, etc., R. R. Co. v. Reisner, 18 Kan. 458.

The employment of a surgeon is not an acknowledgment of a liability to the injured servant, nor can any admission be tortured from such an act. Evidence of such an employment would be incompetent in an action by the servant, and no admission can, therefore, be implied. The employment of a surgeon is nothing more than an act of humanity and justice demanded of a railroad company in behalf of a servant injured in its service.

Judgment affirmed.

Zollars, C. J., dissents on the ground that it is not sufficiently shown that the conductor had authority to bind the company by his contract with appellee.

On Petition for a Rehearing.

Elliott, J.—Counsel for the appellant misconceive the drift of the reasoning in our former opinion, as well as the conclusion announced. We did not decide that a corporation was responsible generally for medical or surgical attention given to a sick or wounded servant; on the contrary, we were careful to limit our decision to

surgical services rendered upon an urgent exigency, where immediate attention was demanded to save life or prevent great injury. We held that the liability arose with the emergency, and with it expired.

We did hold that where the conductor was the highest representative of the corporation on the ground, and there was an emergency requiring immediate action, he was authorized to employ a surgeon to give such attention as the exigency of the occasion made imperiously necessary; but we did not hold that the conductor had a general authority to employ a surgeon where there was no emergency, or where there was a superior agent on the ground. We think our decision was well sustained by the authorities there cited, and that it is further supported by the reasoning in Chicago, etc., R. W. Co. v. Ross, 31 Albany L. J. 8, and Pennsylvania Company v. Gallagher, 40 Ohio St. 637, s. c. 48 Am. Rep. 689.

If the conductor, who is the superior agent of the company on the ground, cannot represent the principal so far as to employ a surgeon to render professional services to an injured servant, and prevent the loss of life or great bodily harm, then it must be said, as it was said by the Supreme Court of the United States in Chicago, etc., R. W. Co. v. Ross, *supra*, that "If such conductor does not represent the company then the train is operated without any representative of its owner."

The decision in Louisville, etc., R. R. Co. v. McVay, *post*, p. 391, is not in conflict with our conclusion in the present case. There the roadmaster was not the superior agent within reach, and there was no emergency demanding immediate action. These are features which very essentially distinguish the two cases. We held in this case a doctrine held in the case cited, namely, that the conductor, or other subordinate agent, has no general authority to employ a surgeon for a sick or wounded servant of the company; but we also held that where the conductor, in control of the company's train and its brakemen, is the highest agent on the ground, he does possess an authority commensurate with an existing and pressing emergency. It seems clear to us, upon principles of fair justice and ordinary humanity, that some one must possess authority to meet an urgent exigency by employing surgical aid to save from death or great and permanent injury a servant under his control. As the reasoning in the McVay case clearly shows, there is still another material difference between the two cases, and that is this: there the roadmaster appeared to only have authority over the repairs of the road; while here it appears that the conductor had charge of the injured servant, and was the highest officer of the corporation capable of acting as its representative in the emergency which had so suddenly arisen.

So far as concerns the general principle involved, there is no conflict, but rather harmony, for the McVay case clearly recognizes the

doctrine that the highest agent capable of acting for the company may employ surgical aid in the proper case.

Petition overruled.[1]

KAYE v. BRETT AND ANOTHER.

1850. COURT OF EXCHEQUER. 5 Ex. 269.

DEBT for goods sold and delivered. Plea, payment in satisfaction. At the trial, before Patteson, J., at the Yorkshire Summer Assizes, 1849, it appeared that the action was brought to recover 94*l.* 3*s.* for goods sold by the plaintiff to the defendants under the following circumstances: W. Kaye, the plaintiff's son, carried on the business of a woolen cloth merchant at Huddersfield until the month of October, 1847, when he compounded with his creditors. On the 30th of October, 1847, the plaintiff, who had made advances to W. Kaye upon the security of a warrant of attorney, issued execution thereon, and took possession of W. Kaye's stock in trade, etc., in his warehouse. Shortly afterwards the plaintiff let the warehouse to Earnshaw, Hinchliffe & Co., and arranged with their salesman to sell his goods. One H. Tozer, who had been in the employ of the plaintiff's son as a bookkeeper, remained in the warehouse as bookkeeper to Earnshaw & Co. The plaintiff, who was a builder, very seldom came to the warehouse; but a book was kept by Tozer, in which he entered the sale of the plaintiff's goods; he also made out invoices, and was accustomed to receive money paid over the counter for goods sold in the warehouse. The defendants carried on business as woolen warehousemen in London; and in December, 1848, H. Brett, one of the defendants, being at Huddersfield, called at the warehouse of Earnshaw & Co., and purchased some of the plaintiff's goods, to the amount of 30*l.* 7*s.* 3*d.* On the 1st of February, 1849, the defendants received the following letter, containing a statement in reference to these goods:

"GENTLEMEN: I beg to hand the above small account, which I trust you will find correct. A cheque for amount in course will oblige, gentlemen, your most obedient servant.

"JOSEPH KAYE, *pro.* H. TOZER.

"P. S. Please address, care of Earnshaw, Hinchliffe & Co."

[1] *Accord:* Toledo, etc., R. Co. v. Rodrigues, 47 Ill. 188. *Contra:* Sevier v. Birmingham, etc., R. Co., 92 Ala. 258. See Marquette, etc., R. Co. v. Taft, 28 Mich. 289, where the judges were evenly divided. See also, Atlantic R. Co. v. Reisner, 18 Kan. 458.

The doctrine of the principal case has been held not to apply to the case of a factory. Chaplin v. Freeland, 7 Ind. App. 676.

It was decided in Cox v. Midland Counties R. Co., 3 Ex. 268, that power to make a contract for surgical attendance upon injured passengers was not incident to the employment of a station master.

The amount was accordingly remitted by letter addressed to the plaintiff, and enclosing a check having a blank for the name of the person to whom it was payable. The receipt of the check was acknowledged by a letter, of which the following is a copy, the initials "H. T." being those of Tozer:

"HUDDERSFIELD, 10th February, 1849.

"GENTLEMEN: I beg to acknowledge receipt of cheque value 29*l* 12*s*., for which am obliged. Gentlemen, your most obedient servant,

"*Pro.* JOSEPH KAYE, H. T."

In the month of February, H. Brett again called at the warehouse of Earnshaw & Co., and purchased goods belonging to the plaintiff, to the amount of 94*l* 3*s*. On the 22d of February the defendants received an invoice of the last-mentioned goods, and a letter, of which the following is a copy:

"GENTLEMEN: The goods herewith are forwarded this morning, and trust will open to your satisfaction. Your further favors will oblige, gentlemen, your most obedient servant,

"*Pro.* JOSEPH KAYE, H. TOZER."

On the 15th of March, 1849, the defendants received a statement and letter, of which the following is a copy:

"GENTLEMEN: Mr. Kaye wishes us to say that he should not have written for payment, but that he understood from Mr. Atkinson that he could have the money whenever he applied for it; and as he is now much pressed for some large payments, he would allow you an extra discount, say 3 per cent., instead of 2½, if you would be kind enough to send us a cheque for him. We are, gentlemen, your most obedient servants,

"*Pro.* EARNSHAW, HINCHLIFFE & Co., H. TOZER."

The defendants wrote in reply a letter addressed to Earnshaw, Hinchliffe & Co., offering to pay the sum to the plaintiff on being allowed an additional 2½ per cent., say 5 per cent., on the amount of the statement; and at the bottom of that letter was the following memorandum in the handwriting of the defendant's clerk:

"Goods, 94*l* 3*s*.; claims 7*s*. 6*d*.; 5 per cent., 4*l* 14*s*.—5*l*. 1*s*. 6*d*. 89*l* 1*s*. 6*d*."

The defendants received in answer the following letter:

"HUDDERSFIELD, 16th March, 1849.

"GENTLEMEN: In reply to your favour of the 15th inst., Mr. Kaye desires us to say that he thinks you are very hard upon him: but, as stated in our last, he is in want of the money. You will therefore please to hand us a cheque per return of post. We cannot say any-

thing about the returns until we see Mr. B. We are, gentlemen, your most obedient servants,

"*Pro.* Earnshaw, Hinchliffe & Co., H. Tozer."

On the 17th of March the defendants remitted a cheque for 89*l* 1*s*., in a letter addressed to Messrs. Earnshaw, Hinchliffe & Co., Huddersfield, and which was delivered at their counting-house. This letter was intercepted by Tozer, who took the check to a bank in Huddersfield, and having obtained cash for it, absconded. The learned judge told the jury that the only question was, whether the payment to Tozer was payment to the plaintiff, and that depended upon whether Tozer was authorized to receive payment in checks, and if so, they should find for the defendants. A verdict having been found for the defendants, in last Michaelmas term a rule *nisi* was obtained to set aside the verdict, and for a new trial, on the ground of misdirection, against which Cleasby showed cause in the following Hilary Vacation (February 8).

This case falls within the principle laid down in Story on Agency, § 127, note 2, viz.: that, "the principal is bound by all acts of his agent within the scope of the authority which he holds him out to the world to possess, although he may have given him more limited private instructions unknown to the persons dealing with him." That doctrine is founded on the public policy of preventing frauds on innocent persons, and the encouragement of confidence in dealings with agents. In this case, if the check had been sent to Tozer, that would have been a valid payment; so that the money has in fact come to the hands of a person authorized to give a discharge; and it is immaterial in what way he got possession of it.

[Parke, B.—If a shopman is accustomed to receive money over the counter, payment to him binds the principal, for there is a representation to all the world that the agent is authorized to receive money in the shop; but that does not import an authority to receive money in any other way.

Alderson, B.—If the plaintiff had directed the defendants to pay the money to a banker, and the defendants had done so, that would have been a good payment; but here the plaintiff gave no direction that the money should be paid to Earnshaw & Co., on his account.]

The defendants paid the money in the ordinary course of business, and Tozer, as the agent of Earnshaw & Co., was as much authorized to receive it as if the defendants had gone to the warehouse and paid him.

[Parke, B.—It is as if the money had been sent by a messenger to Earnshaw & Co., and Tozer had robbed the messenger.]

If the defendants had gone to the warehouse and asked for Tozer in order to pay him, and a person had come forward and represented himself as Tozer, payment to such person would have been good. Barrett v. Deere Moo. & M. 200; E. C. L. R., Vol. 22. There was

no negligence on the part of the defendants, for it is the universal practice of men in business to trust to letters written by clerks.

Watson and Hugh Hill, in support of the rule:

This was a payment, in fact, to Earnshaw & Co., on behalf of the plaintiff. The defendants could not sue Tozer for this money as received to their use, because he was only the agent of Earnshaw & Co. The defendants never intended to pay Tozer, and he is in the same situation as any third person who might have stolen the letter. The circumstance of his letters being signed "per procuration," was sufficient notice to the defendants, and imposed upon them the duty of ascertaining the extent of Tozer's authority. Atwood v. Munnings, 7 B. & C. 278 E. C. L. R., Vol. 14; Alexander v. Mackenzie, 6 C. B. 766; *Id.* 60. It does not appear from the correspondence that there was any implied authority to Tozer to receive the money; but the defendants treat him as merely representing Earnshaw & Co.

Cur. adv. vult.

PARKE, B., now said (after stating the facts): The question is, whether on these facts the receipt of the money by Tozer discharged the defendants. We are clearly of opinion that it did not. Earnshaw & Co. were not authorized to receive the money, and the statement of Tozer to that effect, in the name of Kaye, was false, and therefore the remittance of the money to and the receipt at the counting-house of Earnshaw & Co., was no payment; nor did the defendants mean to pay the money to Tozer, nor was Tozer authorized to receive it in the way in which it was remitted. The receipt, therefore, by Tozer, was not a good payment by the defendants to Kaye. If a shopman, who is authorized to receive payment over the counter only, receives money elsewhere than in the shop, that payment is not good. The principal might be willing to trust the agent to receive money in the regular course of business in the shop, when the latter was under his own eye, or under the eyes of those in whom he had confidence, but he might not wish to trust the agent with the receipt of money elsewhere. We think that in this case the payment was not good, and that the defendants must suffer from the fraud of Tozer; and consequently, the rule will be absolute.

Rule absolute.[1]

[1] "Every agency carries with it, or includes in it as an incident, all the powers which are necessary, or proper, or usual, as means to effectuate the purposes for which it was created, and none other." Wheeler, J., in McAlpin v. Cassidy, 17 Tex. 450, 463.

"It is a general principle, applicable in all such cases, whether the agency be general or special, unless the inference is expressly negatived by some fact or circumstance, that it includes the authority to employ all the usual modes and means of accomplishing the purposes and ends of the agency, and a slight deviation by the agent from the course of his duty will not vitiate his act, if this be immaterial or circumstantial only, and does not, in substance, exceed his power and duty. Such an agency carries with it and includes in it, as an incident, all the powers which are necessary, proper, usual or reasonable, as

KORNEMANN AND ANOTHER v. MONAGHAN.

1871. SUPREME COURT OF MICHIGAN. 24 Mich. 36.

ERROR to Wayne circuit.

This suit was brought by Otto Kornemann and Julius Jungbluth, against William Monaghan, to recover the price of certain goods sold by the former to the latter, through the means of an order taken by a traveling agent of the plaintiffs', named H. C. Pearl. The trial was by jury, and the verdict and judgment were for the defendant.

CAMPBELL, Ch. J.—Plaintiffs forwarded a bill of goods to defendant, ordered by the latter from one Pearl, who did not mention to whom he intended to send the order. The goods were sent to defendant directly, accompanied by a bill in the name of the plaintiffs. A letter, sent at the same time, directing the price to be remitted, is sworn not to have been received. Defendant gave evidence that after receiving the bill he paid the price to Pearl, but not till he had asked him if he had authority to receive it. There had never been any dealings between plaintiffs and defendant, but defendant had previously dealt with Pearl in agencies for other houses, and had paid him money. Pearl disappeared without paying over the money. The court charged that plaintiffs, by sending the goods on Pearl's order, authorized defendant to assume he was empowered to receive payment.

There had been no dealings whatever between defendant and plaintiffs whereby defendant could have been enabled to know anything about Pearl's authority. An agent may have as much or as little power as his principals see fit to give him. The evidence here showed no agency whatever whereby he could lawfully bind them to anything. In the absence of actual authority, the plaintiffs could only be held on the ground that, by their action, they had induced defendant to believe Pearl had full authority to receive money for them. If they had sanctioned such conduct before, that might tend to support the claim. But plaintiffs and defendant had never known each other in business before. The goods were not even sent to Pearl for delivery, but were sent direct to the purchaser from the sellers. There was nothing, therefore, to exonerate the purchaser from ascertaining the agent's powers. This he seems to have supposed he was bound to do, but instead of inquiring of the principals he inquired only of Pearl himself. He had no right to act on anything that did not proceed from the plaintiffs, either as actual authority or in some form of binding admission. There was no proof whatever of either

means to effectuate the purposes for which it was created, and it makes no difference whether the authority is general or special, express and implied; it embraces all the appropriate means to accomplish the end to be attained." Merrimon, J., in Huntley v. Mathias, 90 N. Car. 101. 103.

of [illegible] essentials; and the payment therefore, was entirely unauthorized and in no way binding upon him.

The judgment was erroneous, and must be reversed with costs and a new trial granted.

The other Judges concurred.

STAINBACK v. READ & CO.

1854. Supreme Court of Appeals of Virginia. 11 Grat. 281.

This was an action of assumpsit in the circuit court of Petersburg, brought by F. C. Read & Co. against Stainback & Stainback. Upon the trial the plaintiffs introduced in evidence a bill of exchange, dated the 12th of December, 1842, and was directed to John Stainback, Sen. & Co., Petersburg, Va., for the sum of three thousand nine hundred and sixty-nine dollars and fifty-two cents. The bill was signed by L. E. Stainback by F. C. Stainback, attorney. It was by F. C. Stainback, and was endorsed by the payee and F. Stainback, and was paid by the plaintiffs who received the amount in notes issued by F. C. Stainback and the defendants neither at or since [illegible] at the date of the bill any funds in the hands of the plaintiffs.

The plaintiffs also introduced in evidence the power of attorney from L. E. Stainback to F. C. Stainback set out in the [illegible] copy case. They also offered evidence to prove that at or about the time when the [illegible] of 1842 the defendant and F. C. Stainback and another who died in 1843, were in business in Petersburg as merchants, under the name of L. E. Stainback, Son & Co. That the defendant [illegible] of the concern [illegible] was [illegible] and that F. C. Stainback had the management and settlement of the business of L. E. Stainback, Son & Co. up to the time of his death in 1843. That L. E. Stainback, Son & Co., and also F. C. Stainback had an account at the Bank of Virginia in Petersburg, in December, 1842, and previously, and that L. E. Stainback, Son & Co. were entitled to credit until 1844. That on the 15th of December, 1842 the bill aforesaid was discounted by said bank, and the proceeds passed to the individual credit of F. C. Stainback, on which [illegible] being paid to him by the plaintiffs. That in making up the [illegible] of L. E. Stainback, Son & Co., F. C. Stainback frequently received notes and sold [illegible] that he might control the proceeds.

The plaintiffs also introduced the [illegible] bill of exchange of F. C. Stainback, and addressed to them. The [illegible] December 10, 1842, and is signed "F. C. Stainback, Son & Co." The only point of [illegible] bearing on the case [illegible]

of these essentials, and the payment, therefore, was entirely unauthorized, and in no way bound plaintiffs.

The judgment was erroneous, and must be reversed with costs and a new trial granted.

The other justices concurred.

STAINBACK v. READ & CO.

1854. Supreme Court of Appeals of Virginia. 11 Gratt. 281.

This was an action of assumpsit in the circuit court of Petersburg, brought by C. C. Read & Co. against Littleberry E. Stainback. Upon the trial the plaintiffs introduced in evidence a bill of exchange, which bore the date of the 14th of December, 1842, and was directed to them, whereby they were requested to pay to P. C. & J. D. Osborne & Co. one thousand nine hundred and sixty-nine dollars and forty-two cents. The bill was signed by L. E. Stainback, by F. C. Stainback, attorney, and by F. C. Stainback, and was endorsed by the payees and F. Stainback; and was paid by the plaintiffs, who charged the amount on their books to F. C. Stainback and the defendant; neither of whom had, at the date of the bill, any funds in the hands of the plaintiffs.

The plaintiffs also introduced in evidence the power of attorney from L. E. Stainback to F. C. Stainback, set out in the next preceding case. They also offered evidence to prove that up to some time about the beginning of 1842, the defendant and F. C. Stainback and another, who died in 1841, were in business in Petersburg as merchants, under the name of L. E. Stainback, Son & Co. That the defendant is far advanced in life, attends to no business, and that F. C. Stainback had the management and settlement of the business of L. E. Stainback, Son & Co. up to the time of his failure in 1843. That L. E. Stainback, Son & Co., and also F. C. Stainback, had an account at the Bank of Virginia, in Petersburg, in December, 1842, and previously, and that L. E. Stainback, Son & Co. were indebted to that bank until 1843. That on the 15th of December, 1842, the bill aforesaid was discounted by said bank, and the proceeds passed to the individual credit of F. C. Stainback, the draft not then having been accepted by the plaintiffs. That in managing the bank business of L. E. Stainback, Son & Co., F. C. Stainback frequently endorsed notes and bills last, that he might control the proceeds.

The plaintiffs also introduced two letters, both of them in the handwriting of F. C. Stainback, and addressed to them. One bears date September 21, 1842, and is signed "L. E. Stainback, Son & Co." The only part of it having any bearing on this case is as follows:

"I enclose some paper, for which please send me your notes, payable at Farmville, viz:

My note dated 2d September, at 90 days, favor L. E. S....$1,619.48
Do. do. 7th. do. do..... 1,941.67

3,561.15

For which be pleased to send me your notes in favor of L. E. Stainback, Son & Co., dated 1st September, at 90 days, for $1,618.38, and dated 8th September, at 90 days, for $1,942.77, which will balance. You can use the notes if you wish.

"L. E. Stainback, Son & Co. have $15,000 to pay on the 4th of next month, and I wish to provide myself with paper in time. Your notes you will make payable in Farmville."

The second letter bears date December 15, 1842, and is signed "F. C. Stainback." In it he says, "I have yours of 10th, handing your check for $1,000. Your draft fell due to-day, not on 16th, and I had to alter the date to 15th. I would not have used it if I could have avoided it.

P. S. The draft of $1,740.92 is right. We had another discounted to-day for about $1,900. Will duly take care of them."

The plaintiffs also introduced in evidence certain bills or drafts, one of which was endorsed by L. E. Stainback, by F. C. Stainback, attorney, F. C. Stainback, and L. E. Stainback, Son & Co.; and another was signed as the bill on which this action is founded is signed.

The defendant offered evidence to prove that at the date of the power of attorney aforesaid the defendant was engaged in mercantile business in his own name in Petersburg, F. C. Stainback being a clerk in the defendant's house; and that F. C. Stainback was at that time under age, and engaged in no business on his own account; and that the firm of L. E. Stainback, Son & Co. was formed about 1836 or 1837. The evidence being through, the defendant moved the court to instruct the jury as follows:

1. That under the power of attorney given in evidence in this cause, F. C. Stainback had no authority to draw the bill on the plaintiffs, the payment of which constitutes the foundation of this action; and that the drawing of such bill on the plaintiffs, and the payment thereof by them, did not authorize the said plaintiffs to maintain this action against him.

2. That if they believe, from the evidence, that the bill, the payment of which by the plaintiffs constitutes the foundation of this action, was drawn by F. C. Stainback for his own benefit, and the proceeds thereof went to his own use, that it was not authorized by the power of attorney in evidence in this cause, and that it was the duty of all persons dealing with the said F. C. Stainback as attorney to notice the limitations of his authority, as the same was conferred

by the said power, and that he could only bind his principal in such cases and upon such bills as were included in said authority.

3. That the power of attorney given in evidence in this cause gave no authority to F. C. Stainback to bind the defendant, by drawing or endorsing bills, etc., for the benefit of F. C. Stainback, nor unless the same were drawn or endorsed for the benefit and in the business of the defendant.

4. That if the jury believe from all the evidence in the cause, that the object of the defendant in executing the power of attorney in evidence in this cause was to enable and authorize his son, F. C. Stainback, the attorney, to attend to and transact the bank business of the defendant at the Virginia Bank, in Petersburg, the defendant being then a merchant in Petersburg, and the said F. C. Stainback being under age; and that the bill, the payment of which by the plaintiffs is the foundation of this suit, was not drawn by the said attorney in the course of attending to and transacting the bank business of the defendant at the said bank, but for his own use and accommodation, then the said attorney had no power to bind the defendant by the drawing of the said bill, so as to enable the plaintiffs, on the payment thereof, to recover the amount from the defendant.

The court refused to give the first and fourth instructions, and gave the second and third; but qualified the same by further instructing the jury that the agent, F. C. Stainback, had the power, under the letter of attorney made evidence in the cause, to draw the bill on which this suit is founded, and subscribe the name of his principal (L. E. Stainback) thereto, in the manner in which it is done; and that if the jury shall believe that the plaintiffs accepted the same, and paid it at maturity, without notice of, or just cause to suspect, any intended fraud or misapplication of the proceeds thereof from the use or benefit of the principal, that they then ought to find for the plaintiffs, though they may believe it was an accommodation acceptance. And further, that if the jury shall believe that no fraud or collusion with the agent is chargeable on the plaintiffs, then the fact that the said agent executed the bill in the name of his principal, L. E. Stainback, designating himself as attorney, is equivalent to a declaration on his part that he was acting in the business and for the benefit of his principal; and that any misapplication of the proceeds by the agent after they came to his hands (if there was any) would not defeat the plaintiffs' recovery.

To the opinion of the court refusing the first and fourth instructions, and instructing the jury as aforesaid, the defendant excepted. There was a verdict and judgment for the plaintiffs; and thereupon the defendant applied to this court for a supersedeas, which was awarded.

SAMUELS, J.—A proper analysis of this case will show that it turns upon two questions:

First. Whether F. C. Stainback had the authority of L. E. Stainback, his principal, to draw the bill which is part of the foundation of this suit, or to subject his principal to an action on a collateral contract in regard thereto?

Second. If he had no such authority, is L. E. Stainback still liable for the act of the agent, because of anything in the dealing between the agent and the plaintiffs?

It may be laid down as a rule of law, sanctioned alike by reason and authority, that a power of attorney given to an agent, to act in the name and on behalf of his principal, in the absence of anything to show a different intention, must be construed as giving authority to act only in the separate, individual business of the principal. See Story on Agency, from § 57 to § 143; Atwood v. Munnings, 7 Barn. & Cress. 278; North River Bank v. Aymar, 3 Hill (N. Y.) 262; Stainer v. Tysen, 3 Hill (N. Y.) 262; Hewes v. Doddridge, 1 Rob. 143.

It is equally well settled that a party dealing with an agent, acting under a written authority, must take notice of the extent and limits of that authority. He is to be regarded as dealing with the power before him; and he must, at his peril, observe that the act done by the agent is legally identical with the act authorized by the power. See cases above cited; also 1 American Leading Cases 392, in notes.

These rules of law, applied to the facts of the case, are decisive of the first question. The bill was not drawn in the business of L. E. Stainback, but in that of F. C. Stainback exclusively. It was not identical with a bill drawn in the separate name of L. E. Stainback. A joint bill imposes a joint liability on the drawers in case it be not honored. In case of loss in the business in which the bill is drawn, both parties are bound; and in case one of the drawers be insolvent and the other solvent, as in this case, the whole loss must fall on the solvent party. If, however, a profit be made, it must be divided between those jointly concerned. A contract such as this is widely different from one in which the party liable for a loss, if one occur, is solely entitled to the profit, if one result. Again, the power, in any event, must be held to authorize the agent to draw such bills only as L. E. Stainback might himself have rightly drawn. In the case before us, neither L. E. Stainback, alone, nor L. E. and F. C. Stainback, jointly, had any right to draw the bill in question, having no funds in the hands of the drawees; and having, at the time, no other reason to suppose it would be accepted. The drawer of a bill, when he negotiates it, is to be understood as affirming that he has the right to draw. In the case before us, L. E. Stainback is made to falsely affirm such right; to commit a fraud by means of the falsehood; and all this under color of the authority conferred by him. Under certain circumstances a principal may be bound by the act of his attorney going beyond his power, yet he can be so bound only to an innocent holder for value. Read & Co. are not holders at all; they knew

perfectly well that L. E. Stainback, either solely or jointly with another, had no right to draw on them; that a power to draw bills rightfully would not extend to their house, in the then state of business relations between them and the drawers, or either of them.

The letter of attorney authorized the agent to do certain specified acts, including the drawing of bills. This, as already stated, is to be construed as applying to the rightful drawing of bills in the business of the principal. Within these limits the agent had authority to pledge the credit of his principal, and subject him to the consequent liability. Yet in the case before us the defendant is sued not upon a direct undertaking as drawer, nor upon a liability incident to his position on the bill; he is sued upon an alleged contract to transpose the position of the drawers and acceptors, to make the drawers liable to the acceptors. And all this is said to be implied in the drawing of the bill under the circumstances existing at the time. It cannot be held that an agent may, by implied contract, bind his principal beyond those limits within which he might bind him by express contract; nor can it be held that a power to draw a bill in itself gives the further power to make another original and express contract to indemnify the acceptor against his acceptance. If the attorney could not make an express contract of indemnity, it is impossible to suppose that it can be implied from his drawing the bill.

The second question has, to some extent, been anticipated in considering the first. There are, however, certain considerations peculiar to this branch of the case which require some notice. It is well-settled that, although an agent may in fact exceed his power, yet if he apparently keeps within its limits, and deals with innocent parties for value, the principal will be bound. Mann v. King, 6 Munf. 428; North River Bank v. Aymar, 3 Hill (N. Y.) 262. It is but just that the principal should suffer the consequences of his own misplaced confidence, rather than they should fall on innocent parties. This rule of law, however well established, can afford no aid to Read & Co. upon the facts of this case. They dealt with an agent acting under power of attorney, and as already said, must be regarded as dealing with that power before them. They were bound, at their peril, to notice the limits prescribed therein, either by its own terms or by construction of law. With this knowledge, they nevertheless make a contract, which is not one of those specified in the power, but an original contract to subject the drawers to a liability not incident to their position on the paper. They accepted the bill, having no funds of the drawers; they knew that their acceptance would make them liable to any subsequent holder for value; they relied upon the undertaking of F. C. Stainback for indemnity; this undertaking is contained in the letter dated December 15, 1842, the day the bill was discounted, advising the drawees of the bill and its discount, and promising "to take care of it;" obviously meaning thereby to provide funds for its payment at maturity. This undertaking is contained in

a letter from F. C. Stainback to Read & Co., given in evidence upon the trial. The letter is signed by F. C. Stainback with his own name only, is wholly upon his own business with them, and must be held to be an express guaranty by F. C. Stainback alone. This excludes all possibility of an implied guaranty by L. E. Stainback, either joint or several.

The law, as here declared, required that the first and fourth instructions should have been given; and seeing that, by necessary legal intendment, Read & Co. did know the limits of the attorney's power, and that in making the contract sued on he was exceeding his authority, there was no foundation in the facts of the case for the qualification with which the second and third instructions were given. The court, therefore, erred in annexing such qualification.

I am of opinion to reverse the judgment of the circuit court, and remand the cause for a new trial, with directions to give the four instructions as moved for, if the evidence on the new trial shall be substantially the same as on the former trial and if the instructions shall be again asked for.

ALLEN and DANIEL, JJ., concurred.

MONCURE and LEE, JJ., dissented.

The judgment was as follows:

It seems to the court here, that the power of attorney from Littleberry E. Stainback to F. C. Stainback, given in evidence on the trial in the court below, did not give authority to F. C. Stainback to draw the bill given in evidence, binding said L. E. Stainback as a joint drawer with F. C. Stainback; and that the circuit court erred in refusing to give the first instruction moved for by the plaintiff in error. It further seems to the court here, that the power of attorney, as between the principal and agent, gave no authority to the agent to draw the bill aforesaid for the accommodation of the agent; and that the parties dealing with the agent, and having the means of knowing that the agent was exceeding his power in thus drawing the bill for his own benefit, cannot recover of the principal.

It further seems to the court that the facts, that F. C. Stainback held the bill and had it discounted for his own benefit; that he wrote the letter of December 15, 1842, addressed to the defendants; that they accepted, after receiving that letter, and charged their acceptance to F. C. Stainback, if believed by the jury, taken in connection with the written evidence, were sufficient to show that the defendants had the means of knowing that F. C. Stainback, the agent, in procuring the acceptance of defendants, was procuring it for his own accommodation and not that of his principal; and that the principal was not bound; that the court below should have so instructed the jury, and that it erred on plaintiff's second motion to instruct.

It further seems to the court here, that the court below erred in its action on the plaintiff's third and fourth motions to instruct; that it should have given the instruction above stated as proper to be given

TOWLE v. LEAVITT.

(23 N. H. 360.)

on the second motion to instruct. Therefore, it is considered by the court, that the said judgment be reversed and annulled; that the plaintiff recover of the defendants his costs in this court expended; that the verdict of the jury be set aside, and the cause remanded for a new trial to be had therein; upon which trial, if the evidence shall be the same in substance as that at the former trial, the circuit court shall conform its action to the principles hereby declared.[1]

TOWLE v. LEAVITT.

1851. Supreme Court of New Hampshire. 23 N. H. 360.

Replevin for a phaeton, of the value of fifty dollars. Plaintiff, the owner, left the carriage with one Lane, under an agreement by which he was to make some repairs on it, and then sell it if he could. Plaintiff instructed him to sell it for forty-five dollars if possible, and if he could not get that much, to take forty dollars for it. Lane's property was then under an attachment and advertised to be sold. It consisted of carriages. When the sale of his property was over, Lane told the auctioneer to put up the phaeton in suit for sale, having previously employed a person to bid, with directions not to let the phaeton go for under forty dollars. The carriage was struck off to the defendant, Leavitt, for seventeen dollars, and he paid the amount and took possession of the carriage.

Lane, against the defendant's objection, testified that he had no authority to sell for less than forty dollars. Ricker, the person employed by Lane to bid, testified that he bid seventeen dollars, and that when he heard the carriage struck off at his bid left the place, under the belief that the sale was made to himself. The court instructed the jury that although the defendant was a *bona fide* bidder, he would not acquire title to the property unless he was in fact the highest bidder; that if Ricker and the defendant both bid the same sum, and the auctioneer did not notice Ricker's bid and struck off the property to the defendant, and no objection was made thereto, because Ricker supposed it to be struck off to himself, still he acquired no title, unless he was in fact the highest bidder; that Towle, having

[1] See Murray v. East India Co., 5 B. & A. 203. See also Veatch v. Gilmer, (Tex.), 111 S. W. 746.

"Persons dealing with one whom they know to be an agent and to be exercising his authority for his own benefit, acquire no rights against the principal by the transaction. Such a transaction is usually and perhaps properly spoken of by the courts as fraudulent, but however honest the intention of the parties, the agent's act is invalid mainly because circumstances known to both prove it to be *ultra vires*." Dixon, J., in Dowden v. Cryder, 55 N. J. L. 329, 331. See also Equitable Life Assn. Co. v. Poe, 53 Md. 28.

instructed Lane not to sell the property for less than forty dollars, he had no authority to sell it for less, unless the limitation was intended to be kept secret, and that unless it appeared that the limitation was not to be disclosed, the authority of Lane was limited by it, and unless the price paid for the property was forty dollars, he could not give title to it. Verdict for the plaintiff, which the defendant moved to set aside.

EASTMAN, J. (After disposing of another point)—The questions connected with the agency of Lane, which are presented by the case, are more intricate than the one already considered, and it has not been without some difficulty that the court have arrived at a conclusion in regard to them.

Upon the facts reported, it does not appear that Leavitt knew that the carriage had ever belonged to the plaintiff. This, however, would be material only as making it, or not, necessary for Leavitt to inquire into the nature of Lane's agency in selling the property. If an agency be known, and it is special, it is the duty of the party who deals with the agent to inquire into the nature and extent of the authority conferred by the principal, and to deal with the agent accordingly. Snow v. Perry, 9 Pick. 542; Story on Agency, § 133; Deming v. Smith, 3 Johns. Ch. 344; Schimmelpenic v. Bayard, 1 Pet. 264, 290; Hatch v. Taylor, 10 N. H. 547.

But where the agency is not known, and the principal has clothed the agent with powers calculated to induce innocent third persons to believe that the agent owned the property or had power to sell, the principal is bound, and strangers will not suffer. Story on Agency, § 93. In like manner, an implied authority may be deduced from the nature and circumstances of the particular act done by the principal. If the principal sends his commodity to a place where it is the ordinary business of the person to whom it is confided to sell, it will be intended that the commodity is sent thither for the purpose of sale. And where an article is sent in such a way, and to such a place, as to exhibit an apparent purpose of sale, the principal will be bound and the purchaser will be safe, although the agent may have acted wrongfully, and against his orders or duty, if the purchaser has no knowledge of it. Story on Agency, § 94; Paley on Agency, 167; 2 Kent's Com. 621; Pickering v. Busk, 15 East 38; Saltus v. Everett, 15 Wend. 267; Dyer v. Pearson, 3 Barn. & Cress. 42; Hern v. Nichols, 1 Salk. 288; Sandford v. Handy, 23 Wend. 260.

Lane was a carriage-maker. His business was to make and sell carriages, and also to repair them when brought to his shop for that purpose, as was the case with this carriage of Towle. If Lane's sole business had been to make and sell carriages, the deposit of the one in question with him might come within the principle of the preceding cases; but such was not the fact; and a purchaser would have no such right to presume that a second-hand carriage in Lane's possession was his as would protect him from the claim of a *bona fide*

owner. It is to be observed, too, that this carriage was set up and sold after the property of Lane, which had been previously attached and advertised, was disposed of by the officer. The case does not so state in terms, but probably it was well known to Leavitt and others present that the carriage belonged to Towle. But, however that may have been, we think that the situation of the property was such, taken in connection with Lane's circumstances and the attachment and advertisement of his property, as to put a purchaser upon inquiry.

Assuming that Leavitt knew that Lane was acting as the special agent of Towle in selling the property, or proceeding upon the ground that the property was so situated as to put a purchaser upon inquiry, the question arises, whether the private instructions given by Towle to Leavitt, not to sell the carriage under forty dollars, were in the nature of a limitation to his authority, or were instructions not to be disclosed.

The acts of a general agent, known as such, govern his principal in all matters coming within the proper and legitimate scope of the business to be transacted, although he violates by these acts his private instructions; for his authority cannot be limited by any private instructions, unless known to the person dealing with him. Whitehead v. Tuckett, 15 East 400; Lightboy v. North American Ins. Co., 23 Wend. 22; Lobdell v. Baker, 1 Met. 202 (35 Am. Dec. 358); 2 Kent's Com. 620; Allen v. Ogden, 1 Wash. 174; Story on Agency, § 126; Paley on Agency, 200; Penn v. Harrison, 3 T. R. 757; Mann v. Commission Co., 15 Johns. 44 (8 Am. Dec. 219).

With regard to a special agent, the law appears to be equally well settled, by the authorities above quoted, that if he exceeds the authority given, his acts will not bind his principal. But it is to be observed that a distinction is to be taken between the limited authority of a special agent, one appointed for a specific purpose, to do certain and specified acts, and the private instructions given to such agent. Where the authority is limited in a *bona fide* manner, and the limitation is to be disclosed by the agent, and is disclosed either with or without inquiry, any departure from such authority or instructions will not bind the principal; but where the authority or instructions given are in the nature of private instructions, and so designed to be, they will not be binding upon the parties dealing with the agent. And if the instructions are of such a nature that they would not be communicated if an inquiry was made (even though it be the duty of the person dealing with the agent to make the inquiry), it is not necessary that it should be made, for it would not be communicated if made. Hatch v. Taylor, 10 N. H. 538; Bryant v. Moore, 26 Me. 84 (45 Am. Dec. 96). Upon this view of the question, it would seem that the directions not to sell the carriage for less than forty dollars would be in the nature of private instructions. The fact does not seem to us to have been intended to be communicated. This, how-

ever, may admit of some doubt, and were the case to turn upon this point, a more minute examination would perhaps be necessary.

But it appears to the court that there is one point that must settle the case for the plaintiff. This carriage was sold at auction; and this we think must be regarded as exceeding any authority or instructions given, that could bind the plaintiff. The defendant, knowing the property to be the plaintiff's, or if he did not know it, the situation of the property being such as to render it incumbent on him to make all necessary inquiries, was bound, on seeing it exposed to sale in an unusual manner, to inquire as to the right of Lane thus to sell it. Had he done this probably all difficulty would have been avoided; and whether the directions not to sell for less than forty dollars be considered as a limitation upon the agent's authority or as private instructions, nothing was said about Lane's selling at auction, and no inquiries made in regard to it. A sale at auction implies a sale at any price that may be offered. It is ordinarily the last resort to reduce property into money, and we should be slow to ratify the doings of an agent clothed with the usual powers to sell who should pursue such a course.

Had there been any evidence that Towle authorized Lane to sell the carriage at auction, so that the question could have been properly submitted to the jury, this obstacle in the defendant's case might perhaps have been overcome; but we find nothing that would warrant the court in giving the instructions desired in this respect. A court cannot be required to instruct the jury upon any supposed state of facts.

The sale, then, must be held void, and as a necessary consequence, the defendant has no right to the property, and cannot sustain his defense, notwithstanding there may have been error in some of the rulings made against him.[1] * * *

Judgment on the verdict.[2]

BAKER v. KANSAS CITY, ETC., R. R. CO.

1886. Supreme Court of Missouri. 91 Mo. 152.

Brace, J.—This action was brought to recover damages for the failure of defendant to furnish a certain number of cars, at certain stations, on a specified day. The petition alleges, "that at the times hereinafter mentioned the defendant was, and it still is, a corpo-

[1] A portion of the opinion is omitted.

[2] "The authority of an agent must be determined by the nature of his business and the apparent scope of his employment therein. It cannot be narrowed by private or undisclosed instructions, unless there is something in the nature of the business or the circumstances of the case to indicate that the

over [illegible] kind of goods being sold [illegible] upon this point a more minute examination would perhaps be necessary.

But it appears to the court that [illegible] point that must settle this case for the plaintiff. [illegible] sold at auction; and this auction must be regarded as [illegible] any authority or instructions given Lane could have [illegible]. The defendant, knowing the [illegible] to be the [illegible] did not know it, the situation of the property being such as to render it incumbent on him to make [illegible] inquiry, [illegible] seeing it exposed to sale in an unusual manner, to [illegible] the right of Lane thus to sell it. Had he done this [illegible] would have been avoided; and whether the [illegible] to sell for less than forty dollars be considered as [illegible] the agent's authority, or as private instructions, nothing [illegible] about Lane's selling at auction, and no [illegible] a sale at auction implies a sale at any price [illegible]. It is ordinarily the last resort to reduce property [illegible] we should be slow to sanction the doings of an agent [illegible] powers to sell who should pursue such a course.

There being [illegible] that Towle authorized Lane to sell the carriage [illegible] the question could have been properly submitted [illegible] in the defendant's case might [illegible] but we find nothing that would warrant the [illegible] asked in this respect. A court cannot be [illegible] the jury upon any supposed state of facts.

The title [illegible], and as a necessary consequence, the defendant [illegible] in the property, and cannot sustain his defense, [illegible] may have been error in some of the rulings made [illegible].

Judgment [illegible].

BAKER v. KANSAS CITY, ETC., R. R. CO.

1886. Supreme Court of Missouri. 91 Mo. 152.

[illegible].—This action was brought to recover damages for the [illegible] defendant to [illegible] a certain number of cars at certain stations on a specified day. The petition alleges, "that at the times hereinafter mentioned, the defendant was, and it still is, a corpo-

* A portion of the opinion is omitted.

[illegible] The authority of an agent [illegible] by the nature of his business and the [illegible] of [illegible]. It cannot be narrowed by private [illegible] unless there is something in the nature of the business or the circumstances of the case to indicate that the

ration organized and existing under, and by virtue of the laws of the state of Missouri, and engaged in the business of transporting goods and chattels as a common carrier for hire; that on or about the 27th day of May, 1881, in consideration of the promise then and there made by plaintiff that he would drive to defendant's stations in the towns of Mound City and Maitland, Missouri, and have there on the 31st day of May, 1881, ready for shipment, and to be shipped over defendant's railroad to Chicago, Illinois, cattle and hogs sufficient to fill 23 cars, the defendant undertook and agreed to provide, furnish, and have at its said stations of Mound City and Maitland, on the 30th day of May, 1881, 23 cars in readiness to receive and transport plaintiff's said cattle and hogs as aforesaid; that plaintiff, relying on said undertaking and agreement, drove his said cattle and hogs to said stations, and on said thirty-first day of May, 1881, had at said stations, ready for shipment and to be shipped over defendant's said railroad to Chicago, Illinois, cattle and hogs sufficient to fill twenty-three cars. Plaintiff further states that the defendant, disregarding its said undertaking and agreement, failed to provide, furnish, or have in readiness, at its said stations or either of them, on said thirtieth day of May, 1881, any cars in which to receive and transport plaintiff's cattle as aforesaid, and did not furnish or provide such cars until the 3d day of June, 1881, by reason of which said failure of defendant to provide said cars, at the time and places agreed upon as aforesaid, plaintiff's said cattle were detained at said stations, and were not, and could not, be shipped therefrom on their way to Chicago until the 4th day of June, 1881, to plaintiff's damage in the sum of $3,000;" and then specifies the particulars of the losses and damages by reason of defendant's failure. Defendant's answer was, in effect, a denial that the defendant ever entered into the contract set out in the petition. After the testimony was all in, the court instructed the jury to find for the defendant; thereupon plaintiff took a nonsuit, with leave, and afterwards moved to set the same aside, which motion being overruled, he brings the case here by appeal, and assigns for error the action of the court in instructing the jury to find for the defendant.

The only question presented for our consideration on the record is, was there evidence introduced upon the trial tending to prove that defendant entered into the contract with the plaintiff set out in the petition? It is claimed by the plaintiff that the contract was made with James E. Smith, the defendant's general freight agent; and unless there was evidence tending to prove that such contract was made with said general freight agent, and that he had authority to make the contract, there was no error committed by the trial court. The

agent is acting under special instructions or limited powers." Wells, J., in Markey v. Mutual Benefit Life Insurance Co., 103 Mass. 78, 92.

See article, "Nature and Extent of an Agent's Authority," by Floyd R. Mechem, in 4 Mich. Law Rev. 433, 437–443.

evidence of plaintiff is relied upon to show that the contract was made. He states, substantially, as follows, in chief: "On May 27 I came from home up to Holt county, and stopped in St. Joe. I met Mr. Smith. Mr. Smith was general freight agent of the Kansas City & Council Bluffs Railroad. I told him I wanted twenty-three cars on the 30th, eight at Mound City and fifteen at Maitland, for Chicago. I asked him if he could get the cars, and he said he could, and called a clerk to take down the order, and asked me, would I have the cattle there? I said I would, and wanted the cars on Monday, so that I could bed them. I told him I wanted the cars. He asked me if I could have the cattle there. I said I would. He then said I could have the cars, and called the clerk to take the order, and then told me to see the agents at Mound City and Maitland. I went to Mound City and Maitland, and spoke to them as Smith had requested me to do. I made the arrangements with Mr. Smith. I did not see any other party;" and on cross-examination: "I told him (Smith) I wanted twenty-three cars at Mound City and Maitland—eight at Mound City and fifteen at Maitland; asked if I could have the cars. He said I could, and asked me if I would bring the cattle in; I said I would, and he called the clerk and gave him the order. I told him I wanted the cars May 30, and that, if I had the assurance of cars, the stock would be there. He then said he would have the cars there. I am sure he made that expression. He then called the clerk to take down the number of cars. I suppose the clerk did take it down. Saw him write at Smith's dictation. Nothing further occurred at the time."

We think this evidence tends to prove the contract between plaintiff and Smith. It shows a concurrence of the minds of both parties at the same time, in a mutual undertaking having the same object in view, *i. e.*, the shipment of plaintiff's cattle to Chicago in defendant's cars; and, interpreted in the light of common sense and ordinary good faith, mutual and reciprocal promises from each to the other—the promise of Smith being to furnish the cars at the stations named at the time stated, and the promise of plaintiff being to have his cattle at the stations named at the time stated, the promise of each being a good consideration for the promise of the other, and upon which each had a right to rely and act.

The inquiry remains, did the evidence tend to show that Smith had authority to make the contract? It appears unequivocally from the evidence that during the months of May and June, 1881, Smith was, and for a year and more prior to that date had been, defendant's general freight agent; that his office, as such, was at St. Joseph; that the city of Chicago is beyond the terminus of defendant's line of railroad; that its freight was carried to that city from Burlington Junction, Missouri, by the Chicago, Burlington & Quincy Railroad, by virtue of a traffic arrangement existing between these companies; that Maitland and Mound City are stations on defend-

ant's railroad at some distance from St. Joseph, and from each other; that defendant had station agents at each of said stations; and tended to prove that the contract was made between plaintiff and Smith at the office of the general freight agent at St. Joseph; that on a previous occasion plaintiff's cattle had been shipped from Kansas City over defendant's road upon a contract made with Smith, and on a previous occasion plaintiff had applied by mail for cars to the office of the general freight agent. The foregoing is all the evidence relied upon in this case to show that Smith had authority to make the contract sued on. It may be conceded that there is nothing in the evidence tending to show that authority to make the contract sued on had been expressly conferred upon the agent, Smith, or that, according to the general usage and custom of defendant's railroad, the making of such contract was within the apparent scope of his usual and ordinary duties; and if he had such authority it is because the defendant held him out, or permitted Smith to hold himself out, to plaintiff and the world as having such power. The contract itself shows that Smith held himself out to plaintiff as having the power to make the contract, and also that plaintiff believed that Smith did have such power.

Was he justified in entertaining that belief, and acting upon it by reason of the apparent authority with which the defendant had clothed him? At the time this contract was made the defendant was holding Smith out to plaintiff and the world as its general freight agent, as it had been doing for more than a year immediately preceding that date. It had conferred upon him the title, and placed him in that position, in that department of its business, devoted to the transportation of freight from one place to another for hire, and in that particular line of its business it held Smith out to the plaintiff and the world as its general agent, as one authorized to transact all defendant's business in that particular line or department. In that line of defendant's business Smith was held out, not merely as having authority, but as having general authority; "and in such cases good faith requires that the principal should be held bound by the acts of the agent within the scope of his general authority." Story Ag., § 127. When the principal puts the agent forward as a general agent, or places him in a position where others are justified in the belief that his powers are general, the restrictions that may be imposed privately on the agent will be immaterial, except as between him and the principal, and can have no effect on the rights or remedies of third persons who have no knowledge of the restrictions or limitations upon his apparent authority. Grafius v. Land Co., 3 Phila. 447. And there is no reason, and can be no legal principle, that will put the agent of a corporation on any different footing than an agent of an individual in regard to the same business. Adams M. Co. v. Senter, 26 Mich. 73.

Henry, J., in Grover & Baker S. M. Co. v. Mo. Pac. Ry. Co., 70

Mo. 672, in distinguishing the powers of a special from those of a general freight agent, approved the doctrine laid down by Sutherland, J., in Burtis v. Buffalo & S. L. R. Co., 24 N. Y. 274, "that if defendant had the power to make, or authorize the making of, such a contract, then the person acting as the general freight agent should be deemed to have been clothed with all the power to make contracts for freight, or in respect to the carrying and delivery of freight that the principal had." There is no question as to the power of the defendant to make the contract in this case, and it was a contract for freight—a contract having for its object the shipment of plaintiff's stock over defendant's road for him, on a certain day, from two of its stations to Chicago. The leaving the cars and the cattle at those stations on that day was not the end and object of the contract, but means by which the object was to be accomplished. "A grant of general authority includes within it all the necessary and usual means of executing it with effect, and all the mediate powers necessary to the end, and incident to the primary power, although not expressly given." Story, Ag., § 58.

From the foregoing it appears that the defendant, having put Smith before the world as its general freight agent, clothed him with the apparent power to make all necessary contracts in the line of business committed to his general control. A necessity of that line of business being that shippers shall have furnished them at particular stations, at certain dates, cars for the shipment of their freight. Pruitt v. Hannibal & St. J. R. Co., 62 Mo. 528. He was clothed with apparent authority to make the contract sued on; and when plaintiff, having freight which he desired to ship on defendant's road from two of its stations on the same day, to a point beyond the terminus of defendant's line of road, needed cars for its transportation at such stations on that day he had a right to assume that such general freight agent had authority to make the contract. On a former occasion when plaintiff desired to ship this same stock on defendant's road, on application to Smith it was shipped. The evidence fails to show that any other officer or agent was held out as authorized to make the contract. Plaintiff had no right to assume that either of defendant's station agents could make a contract for cars at the station of the other, or that either or both of them had such authority as would enable them to have the cars at both stations at the same time; so that on the face of the transaction Smith not only had apparent authority to make the contract, but there was no ground for an assumption on the part of plaintiff that any other officer or agent of defendant had that authority. It follows that, if the defendant had imposed any limitations upon this apparent authority of its general freight agent, such limitations could not affect the plaintiff unless brought to his knowledge, and this was a question of fact to be submitted to the jury; and the evidence in the case tending to show that Smith, the general freight agent, had au-

thority to make the contract, and paid to the agent the money con- cert with plaintiff; and the failure of defendant to furnish the same for the allotment of plaintiff's store, so the damages having been satisfactorily shown, we think the court committed error in taking the case from the jury, for which cause the judgment is reversed and the case remanded for new trial.

LAW v. STOKES.

1867. Supreme Court of New Jersey. 32 N. J. L. 249.

Depue, J.—The plaintiff brought this action to recover the amount of a bill of goods, sold by him to the defendant. The sale and delivery of the goods were not denied, and the only question in controversy at the trial was whether the defendant had paid for them.

The plaintiff, at the time of the transaction, was an importer of earthenware, doing business in the city of New York, and the defendant the keeper of a hotel at Long Branch, in this state.

On the 30th of July, 1865, the defendant purchased, at the store of the plaintiff, in New York, of one J. M. Sheridan, a bill of earthenware amounting to the sum of three hundred and twenty dollars and thirty-seven cents. It appears from the evidence in the cause that Sheridan was employed by the plaintiff to sell goods for him, without any salary, but a commission on his sales. The goods in question were sold on credit, and were to be paid for on the 20th day of the next August. The goods were shipped to the defendant on the 31st day of July, 1865, and on the same day the plaintiff wrote the defendant a letter, of which the following is a copy:

"Mr. W. Stokes, Long Branch:

"Dear Sir—I beg to hand you bill of ware purchased by you and duly forwarded as per directions. I trust you will find all satisfactory. Please remit amount direct to me.

"Yours truly,

"Henry D. Law.

"August 1, 1865."

Enclosed with the letter was a bill of the goods, in the name of Henry D. Law as vendor, at the heading of which was printed plainly and conspicuously in red letters, "all remittances on account, or in settlement of bills, must be made direct to the proprietor, or with his authority in writing." On the 21st of August, 1865, the defendant paid Sheridan for the goods, at the defendant's hotel at Long Branch, and took from him a receipt for the money, signed "J. M. Sheridan for Henry D. Law." Sheridan never paid the money to the plaintiff, and has left the country.

thority to make the contract, and that he did enter into such contract with plaintiff, and the failure of defendant to furnish the cars for the shipment of plaintiff's stock, to his damage, having been satisfactorily shown, we think the court committed error in taking the case from the jury; for which cause the judgment is reversed, and the case remanded for new trial.

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The plaintiff, at the time of the transaction, was an importer of earthenware, doing business in the city of New York, and the defendant the keeper of a hotel at Long Branch, in this state.

On the fifth of July, 1865, the defendant purchased, at the store of the plaintiff, in New York, of one J. B. Sheriden, a bill of earthenware amounting to the sum of three hundred and twenty dollars and thirty-seven cents. It appears from the evidence in the cause that Sheriden was employed by the plaintiff to sell goods for him, without any salary, for a commission on his sales. The goods in question were sold on a credit, and were to be paid for on the first day of the next August. The goods were shipped to the defendant on the sixth day of July, 1865, and on the same day the plaintiff wrote the defendant a letter, of which the following is a copy:

"Mr. W. Stokes, Long Branch:

"Dear Sir—I beg to hand you bill of ware purchased by you, and duly forwarded as per direction. I trust you will find all satisfactory. Please remit amount direct to me.

"$320.37. Yours truly,

"Henry D. Law.

"August 1, 1865."

Enclosed with the letter was a bill of the goods, in the name of Henry D. Law, as vendor, in the heading of which was printed plainly and conspicuously, in red letters, "all remittances on account, or in settlement of bills, must be made direct to the principal; salesmen not authorized to collect." On the sixteenth of August, 1865, the defendant paid Sheriden for the goods, at the defendant's hotel, at Long Branch, and took from him a receipt for the same, signed, "J. B. Sheriden, for Henry D. Law." Sheriden never paid the money to the plaintiff, and has left the country.

The fact of this payment to Sheriden is not disputed, but the plaintiff insists that Sheriden had no authority to collect the money, and, therefore, the payment to him is no discharge.

Sheriden was a mere salesman for a commission. As such he had authority to sell goods on credit, but not to discharge purchasers from debts incurred by them in purchasing goods through him, of the plaintiff. An agent employed to make sales, and selling on credit, is not authorized subsequently to collect the price in the name of the principal, and payment to him will not discharge the purchaser, unless he can show some authority in the agent other than that necessarily implied in a mere power to make sales. Seiple v Irwin, 30 Penn. (6 Casey) 513. Such authority may be shown by proof, either that the agent was expressly authorized to receive and discharge debts, or that he was held out by his principal to the public, or to the defendant, as having such authority.

A principal is bound by the acts of his agent within the authority he has actually given him, which includes not only the precise act which he expressly authorizes him to do, but also whatever usually belongs to the doing of it, or is necessary to its performance. Beyond that, he is liable for the acts of the agent within the appearance of authority which the principal himself knowingly permits the agent to assume, or which he holds the agent out to the public as possessing. For the acts of his agent, within his express authority, the principal is liable, because the act of the agent is the act of the principal. For the acts of the agent, within the scope of the authority he holds the agent out as having or knowingly permits him to assume, the principal is made responsible, because to permit him to dispute the authority of the agent in such cases would be to enable him to commit a fraud upon innocent persons. In whichever way the liability of the principal is established, it must flow from the act of the principal. And when established it cannot, on the one hand, be qualified by the secret instructions of the principal, nor, on the other hand, be enlarged by the unauthorized representations of the agent. These principles find ample illustrations in the elementary books and in decided cases. 1 Parsons on Cont., 44, 45; 2 Kent 620, 621; Mechanics' Bank v. N. Y. & N. H. R. R. Co., 3 Kernan, p. 632, per Comstock, J.; F. & M. Bank of Rens. Co. v. Butchers' and Drovers' Bank, 16 N. Y. (2 Smith) 125; Story on Agency, § 127; Dunning v. Roberts, 35 Barb. 463; Thurman v. Wells, 18 Barb. 500; 1 Am. Leading Cases 567 (fourth edition).

Where an agent is entrusted with the possession of goods, with an unrestricted power to sell, (Higgins v. Moore, 6 Bosw. 344), or payments are made over the counter of the principal's store to a shopman accustomed to receive money there for his employer—Kaye v. Brett, 5 Exch. 269—the authority to receive payment will be implied in favor of innocent persons, because the principal, by his own act, gives to the agent an apparent authority to receive such payment.

...ion of the principal towards such payment, and payment to a principal by his agent personally, or to a creditor who, upon a reasonable notice thereof, the creditor would have no right to object to, were the ordinary rules of law applicable to the case.

In the case now before the court, Sheridan had no authority to receive the money. The sale was made on a credit, and the payment was made to him, not over the plaintiff's counter at his place of business, but at the defendant's house. In most respects, the case resembles that of Semple v. Irwin, where the payment to the agent was considered. He had no express authority to collect the debt in question, nor was there any evidence that the plaintiff held out to the public, or to the defendant as having such authority. The letter of the plaintiff expressly directs that the money on the bill sought to be remitted directly to him. That letter, it is true, was never received by the defendant. The weight of the evidence is that this letter was sent and was received before the payment was made to Sheridan. But independent of that, the evidence on the part of the defendant shows that the bill, which was produced by him at the trial, was received before the goods were unpacked, and that his agent, who was his bookkeeper, and had charge of receiving those goods, related, as the goods on the bill, and told the defendant that it was correct.

The defendant testified that he never saw the bill until after the payment was made to Sheridan, and the jury have found that he did not read the heading of the bill—clear he had any time to do it. The plaintiff did all that prudence and good faith required of him, to prevent the defendant falling into an error in regard to the authority of his salesman. Immediately upon the shipment of the goods, he wrote the letter to the defendant, requiring him to remit the money to him, and enclosed in it the bill of the goods, on the face of which was printed a notice that salesmen were not authorized to collect. That bill, at least, got to the hands of the defendant's son, who was his book-keeper and authorized to pay bills, and had charge of comparing the goods with the bill, and who was present when the money was subsequently paid to Sheridan. So to have acted in relation to the bill-head was the prudent mechanical act of a person who intended to protect his own interests. It could be no more a precedent for negligence and open the door to fraud, especially as when the party is himself bound to see to it that the person with whom he transacts business as an agent has the authority which he assumes. Capel and another v. Thornton, 3 C. & P. 352, is not a parallel case with this. In that case the defendant dealt with Ellsworth, the agent of principal, without any knowledge of his agency. The case for the price at which the coal was invoiced was ordered of Ellsworth, and the defendant paid Ellsworth. The only evidence of notice of his agency, before the bill was paid, was the porter's bills, which the coal and delivered

But if the principal forbids such payments, and requires all payments to be made to himself personally, or to a cashier, and gives a customer notice thereof, the customer would have no right to insist upon the apparent rather than the real authority of the agent.

In the case now before the court, Sheriden had not the possession of the goods. The sale was made on a credit, and the payment was made to him, not over the plaintiff's counter, at his place of business, but at the defendant's hotel. In most respects, the case is similar to that of Seiple v. Irwin, where the payment to the agent was not sustained. He had no express authority to collect the debt in question, nor was there any evidence that the plaintiff held him out to the public, or to the defendant, as having such authority. The letter of the plaintiff expressly directs, that the money for this bill should be remitted directly to him. That letter, it is said, was never received by the defendant. The weight of the evidence is that that letter was sent and was received before the payment was made to Sheriden. But independent of that, the evidence on the part of the defendant shows that the bill, which was produced by him at the trial, was received before the goods were unpacked, and that his son, who was his book-keeper, and had charge of receiving those goods, ticked off the goods on the bill, and told the defendant that it was correct.

The defendant testified that he never saw the bill, until after the payment was made to Sheriden, and the son says that he did not read the heading of the bill—that he had not time to do it. The plaintiff did all that prudence and good faith required of him, to prevent the defendant falling into an error in regard to the authority of his salesman. Immediately upon the shipment of the goods, he wrote the letter to the defendant, requiring him to remit direct to him, and enclosed in it the bill of the goods, on the face of which was printed a notice, that salesmen were not authorized to collect. That bill, at least, was in the hands of the defendant's son, who was his book-keeper, and authorized to pay bills, and had charge of comparing the goods with the bill, and who was present when the money was subsequently paid to Sheriden. Not to have seen the directions in the bill-head was the grossest negligence, and to permit a party to defend under the protection of his own carelessness, would be to offer a premium for negligence, and open the door to fraud, especially so when the party is himself bound to see to it, that the person with whom he transacts business, as an agent, has the authority which he assumes. Capel and another v. Thornton, 3 C. & P. 352, is not a parallel case with this. In that case the defendant dealt with Ellsworth, the agent, as principal, without any knowledge of his agency. The coal, for the price of which the suit was brought, was ordered of Ellsworth, and the defendant paid Ellsworth. The only evidence of notice of his agency, before the bill was paid, was the vendor's ticket, sent with the coal, and delivered

to the defendant's footman, and not shown to have reached the defendant. After the payment was made, a notice was sent to the defendant, by the plaintiffs, to pay the amount to them, or to their clerk and not to Ellsworth. The defendant had no knowledge of the agency, and the footman was not her agent in relation to that business, and the notice which the defendant did receive came after the payment was made. These circumstances render that case wholly unlike the case now before the court.

It was further insisted, on the argument, that there was evidence of a subsequent ratification, sufficient to go to the jury. It does not appear that any such question was raised at the trial, and if it had been, there is no evidence in the cause that would have justified the jury in finding a ratification by the plaintiff of the unauthorized payment to Sheriden.

The verdict is against the evidence, and contrary to law, and should be set aside and a new trial granted; costs to abide the event.

DAYLIGHT BURNER CO. v. ODLIN.

1871. Supreme Judicial Court of New Hampshire.
51 N. H. 56.

Assumpsit, by the Daylight Burner Company against James W. Odlin, an expressman, for delivering goods marked "C. O. D." without receiving the price. The plaintiff is a corporation, doing business in the city of New York. The defendant is an expressman, between Boston and Exeter. The plaintiff sent from New York, by Adams's express, a package of goods directed to one Berry, Exeter, N. H., and a bill of the same, for $55.80, from the plaintiff to Berry, marked "C. O. D.," which, by the usage of express business, means "cash on delivery," and imports an order that the goods are not to be delivered to the consignee unless he pays the amount of the bill, which the expressman is to return to the consignor; and such was the understanding of the plaintiff and the defendant. The defendant carried the goods and bill from Boston to Exeter, and Berry refused to pay the price, alleging that, by the terms of the bargain under which he was to receive them, he was not to pay for them cash on delivery. The bargain with Berry was made by one Moore. Upon the refusal of the defendant to deliver the goods to Berry without payment of the bill, a correspondence ensued between Berry and Moore; and Berry received from Moore, and gave to the defendant, a written order from Moore to the defendant, directing the defendant to deliver the goods to Berry "without C. O. D.," and the defendant delivered them accordingly without payment.

The plaintiff's evidence tended to show that Moore traveled to sell his own goods, and that he said to one Ludlow, who was the secretary, treasurer, and general business agent, manager and one of the three directors of the plaintiff, that he might, in his travels, find customers for some of the plaintiff's goods; that Moore was to receive from the plaintiff ten per cent. of the amount of his sales of the plaintiff's goods; that he made several sales for them; that he had no interest in the corporation or its goods; that he had no authority to sell the plaintiff's goods on any other terms than cash on delivery; that he had no authority to give said written order to Odlin, and that the order was given and executed without the knowledge of the plaintiff.

The defendant's evidence tended to show that, by the bargain made by Moore with Berry, Berry was not to pay for the goods cash on delivery.

The court instructed the jury that there was evidence for them to consider upon the question whether Moore was an agent of the plaintiff, authorized to sell the plaintiff's goods; that if there was an understanding between the plaintiff and Moore, that Moore had authority to sell the plaintiff's goods for cash on delivery, and that he was to receive from the plaintiff ten per cent. of the amount sold by him, as payment for his services, he was an agent of the plaintiff, and authorized to sell the plaintiff's goods for cash on delivery; and that, as between him and the plaintiff, the limitation that he should sell only for cash on delivery was binding; but that such limitation of his authority would not necessarily conclude other persons who had no notice of it; that if the defendant had no notice of the limitation, if he knew nothing of Moore's authority except that he was authorized to sell, and if the defendant, in good faith, delivered to Berry without payment goods sold by Moore as agent of the plaintiff, which Moore ordered the defendant to deliver without payment, the defendant is not liable; that the defendant is held to have had notice of the limitation if he was put upon inquiry, and if by reasonable inquiry he would have ascertained it; and that, upon the question whether he was put upon inquiry, the fact that the bill of the goods was marked "C. O. D." was evidence for the jury to consider. To these instructions the plaintiff excepted.

The plaintiff excepted to the refusal of the court to give the following instructions:

1. Moore's order was not sufficient authority to Odlin to deliver the goods.

2. There is no evidence that Moore was the agent of the plaintiff authorized to change the contract of the plaintiff with Odlin.

3. If Moore had the right to sell the goods, he would not have the right to change the contract with Odlin, and order the goods delivered without payment.

4. The bill marked "C. O. D." was notice to the defendant of Moore's limited authority.

5. If the bill was not notice, it was sufficient to put the defendant on inquiry.

Verdict for the defendant, and the plaintiff moved to set it aside.

BELLOWS, C. J.—From the uncontradicted testimony of the plaintiff and the finding of the jury, it may be assumed that Moore was clothed by the plaintiff with an apparent authority, like that of a factor, to sell all the goods of the plaintiff he could sell within his business circuit, on a commission of ten per cent.

As incident to that general authority, he had power to fix the terms of sale, including the time, place, and mode of delivery, and the price of the goods, and the time and mode of payment, and to receive payment of the price, subject of course to be controlled by proof of the mercantile usage in such trade or business.

There is some conflict in the adjudged cases upon the question of the authority of a factor to sell on credit, but we think the weight of modern authority is in favor of the position that he may sell on credit, unless a contrary usage is shown. Goodenow v. Tyler, 7 Mass 36; Hapgood v. Batcheller, 4 Met. 576; Greely v. Bartlett, 1 Greenl. 178; Van Alen v. Vanderpool, 6 John. 70; Robertson v. Livingston, 5 Cow. 473; Leland v. Douglass, 1 Wend. 490;—and see 1 Am. Lead. Cases (4th ed.) 662, note, where it is said that it is universally established as the law-merchant that a factor may sell on credit. So in Laussatt v. Lippincott, 6 S. & R. 386, and May v. Mitchell, 5 Humph. 365, and Story on Agency, § 209.

The same views are recognized in Scott v. Surman, Willes 406; Russell v. Hankey, 6 T. R. 12; Haughton v. Mathews, 3 B. & P. 489, per Chambre, J.; 3 Selw. N. P. 719.

In the case before us, Moore stands much on the same footing as a factor. The most marked distinction is, that he is a traveling merchant, and did not apparently have his principal's goods with him; but this, we think, cannot affect the rule.

The reason of that rule in the case of factors is, that it is found, by experience and repeated proofs in courts of justice, that it is ordinarily the usage of factors to sell on credit; and the same reason will apply in this case.

We have a case, then, where the agent was apparently clothed with the authority to sell the plaintiff's goods, without limitation as to the quantity, and on commission, for cash or on credit as he might think proper; and this being so, Moore must be regarded, in respect to third persons, as the plaintiff's general agent, whose authority would not be limited by instructions not brought to the notice of such third persons. Backman v. Charlestown, 42 N. H. 125, and cases cited.

As Moore, then, in respect to third persons, had the power to sell on credit, the authority to control the delivery of the goods so

sold and sent to his order, for the purpose of having it conformed to the contract of sale, would necessarily come within the scope of his agency; and we think his order to the consignee would justify a delivery of the goods against payment of the price, if the latter of the actual want of authority. As to that the agent's assurance was real authority.

The marking of the packages by another agent of the principal, to the effect that cash was required on delivery, was not to the notice of such part of authority. Although it might be sufficient to put the defendant upon inquiry. That, however, was properly left to the jury, and they have found it not to be sufficient for that purpose. The marking of the packages in that way does not necessarily imply that the agent had an authority to sell on credit, but it might indicate merely that the person so marking it supposed the sale to be for cash. And it might still be considered to come within the scope of Moore's agency to make the delivery conformable to the contract of sale.

As the defendant, therefore, is found to have had no notice or want of authority in Moore, and was not put upon inquiry, there must be

Judgment on the verdict.

THURBER & CO. v. ANDERSON.

1858. Supreme Court of Illinois. 20 Ill. 532.

Scates, C. J.:—The controversy in this case is whether appellee is liable for a bill of goods sold and imported she ordered to be sent home to his address, on an order drawn in his name by his son, an infant, in his absence. The son received the goods and took one of them himself, without the knowledge of appellee.

Appellee denies that his son had any authority to purchase goods for him, and also denies that he ever had any knowledge of his having received these goods; but it does not appear that appellants had any reason to suspect that the goods were not ordered by him.

The goods were ordered December 4, 1855, and several successive months, and on four days, and prior and subsequent thereto, appellee's son was in the grocery, and that during the time he was there, he sold goods, gave orders to runners for goods received, traded the goods sold, receipted, in his father's name, for various packages, selected goods from other houses in his father's store, and corresponded with reference thereto; and, also, that during that time he did not profess to be doing business for himself, and it was the reasonable presumption, from the evidence, that he had full knowledge.

a ... The bill marked "C. D." was not to be delivered to the defendant if Moore's limited authority.

... If the bill was not ... the defendant to pay the defendant ... money.

... the plaintiff ... to set it aside ... accommodation testimony of the ... and ... It may be assumed that Moore ... to ... an apparent authority, like that of a ... to sell at the ... the plaintiff he could sell within his ... on a ten per cent.

... authority, he had power to fix the ... time, place, and mode of delivery, and the ... the time and mode of payment, and to receive ... subject of course to be controlled by proof of ... such trade is lawless.

... adjudged cases upon the question of ... and on credit, but we think the weight ... of the position that he may sell ... usage is shown. Gardenier v. Tyler, 7 ... 4 Met. 570; Varnell v. Bartlett, 1 ... Liverpool, 6 John. 70; Robertson v. ... Lloyd v. Douglass, 1 Wend. 290—and ... 662, note, where it is said that it ... by universal that a factor may ... P. Liquinet, 6 B. & R. 386, and May ... and Story on Agency, § 100.

The ... cases in Scott v. Surman, Willes 400; ... Houghton v. Matthews, 3 B. & P. 489, per ... p. 502).

In the case ... stands much on the same footing as a factor. ... difference is, that he is a traveling ... Like the principal's goods with ... but ... them for sale.

The reason of ... case of factors is, that it is found, ... in course of justice, that it is ... an credit, and the same reason ... in the case ...

... the agent was apparently clothed ... authority to sell ... goods without limitation ... as to the quantity, and on ..., for cash or on credit as he ... proper, and ... Moore must be regarded, in ... to third persons, as ... general agent, whose authority ... not be ... instructions not brought to the ... of such third persons. ... v. Charlestown, 42 N. H. 125 and cases cited.

As Moore, then, ... power ... persons, and the power to sell on credit, the authority ... delivery of the goods to

sold and sent to his order, for the purpose of making it conform to the contract of sale, would necessarily come within the scope of his agency; and we think his order to the defendant would justify a delivery of the goods without payment, unless he had notice of the agent's want of authority. As to him the agent's apparent authority was real authority.

The marking of the package by another agent of the plaintiff, to the effect that cash was required on delivery, was not in law notice of such want of authority, although it might be sufficient to put the defendant upon inquiry. That, however, was properly left to the jury, and they have found it not to be sufficient for that purpose. The marking of the package in that way does not necessarily imply that the agent had no authority to sell on credit, but it might indicate merely that the person so marking it supposed the sale to be for cash. And it might well be considered to come within the scope of Moore's agency to make the delivery conform to the contract of sale.

As the defendant, therefore, is found to have had no notice of any want of authority in Moore, and was not put upon inquiry, there must be

Judgment on the verdict.

THURBER & CO. v. ANDERSON.

1878. Supreme Court of Illinois. 88 Ill. 167.

Scholfield, C. J.—The controversy in this case is, whether appellee is liable for a bill of cigars and imported ale shipped by appellants to his address, on an order drawn in his name by his son, on them, to that effect. The son received the goods and made use of them himself, without the knowledge of appellee.

Appellee denies that his son had any authority to purchase goods for him, and also denies that he ever had any knowledge of his having ordered or received these goods; but it does not appear that appellants had any reason to suspect that the goods were not ordered by him.

The goods were ordered December 4, 1875, and several witnesses testify, that at that time, and prior and subsequent thereto, appellee's son was in his grocery, and that, during the time he was there, he sold goods, gave orders to runners for goods, received money for goods sold, receipted, in his father's name, for express packages, ordered goods from other houses in his father's name, and corresponded with reference thereto; and, also, that during that time, he did not profess to be doing business for himself. And of all this, the reasonable presumption, from the evidence, is, appellee had full knowledge.

We do not think it necessary to inquire precisely what authority appellee, in fact, conferred upon his son in regard to his business, because, in our opinion, the decided preponderance of the evidence is, that he was suffered to act as a general agent both in buying and selling, and the public were, therefore, justified in assuming that he possessed all the powers requisite to a general agent in buying and selling. It is true, as contended by counsel for appellee, that an authority to buy can not be inferred simply from an authority to sell; yet where a clerk or shopman has been accustomed to buy as well as to sell, the presumption of full authority is equally applicable to both. Story on Agency, § 89. By permitting another to hold himself out to the world as his agent, the principal adopts his acts, and will be held bound to the person who gives credit thereafter to the other, in the capacity of his agent. 2 Kent's Com. (8th ed.) 799.

It is suggested, however, that the goods here ordered were not such as were suited to the business in which appellee was engaged, and that, in no view, could the son bind apellee by contracts for goods not in the line of his trade.

The evidence fails to show that the goods ordered were not such as are within the line of business in which appellee was engaged. His evidence was: "Am in grocery; general stock; keep tobacco, etc." Another witness, Benjamin Kinkly, speaks of his having a "grocery and saloon."

No witness says that imported ale and cigars, such as were ordered, are articles not adapted to such business, and we are not warranted in so presuming in the absence of evidence.

We are of opinion that, under the evidence before us, the judgment does injustice to appellants, and that it should, therefore, be reversed. The judgment is reversed and the cause remanded.

Judgment reversed.[1]

[1] Compare Hirshfield v. Waldron, 54 Mich. 649.

"A principal is responsible for the acts of one who is his agent, or appears to be, if responsibility is asserted on the ground of apparent authority in the agent to do the acts, only in case the principal has clothed the agent with the appearance of power, and not when the agent's own conduct creates the appearance." Goode, J., in Taylor v. Sartorious, 130 Mo. App. 23, 34.

"In determining the extent of an agent's authority, it is more important to look to the nature of the duties he is accustomed to perform than to the name by which he is called. If these duties are those of a manager or an assistant manager, it is immaterial that he is referred to by his principal as a bookkeeper. By a course of dealing Huggins had been held out as having authority to deliver and to refuse to deliver meal and to receive payment therefor; he was thereby clothed with apparent authority to that extent." Powell, J., in Fitzgerald Cotton Oil Co. v. Farmers' Supply Co., 3 Ga. App. 212, 214.

See particularly Lightbody v. North American Insurance Co., 23 Wend. (N. Y.) 18.

PICKERING v. BUSK AND ANOTHER

1812. COURT OF KING'S BENCH. 15 East 38

Trover for hemp. At the trial before Lord Ellenborough, C. J., at the sittings after Trinity term in London, it appeared that Swallow, a broker in London, engaged in the hemp trade, purchased for the plaintiff, a merchant at Hull, a parcel of hemp then lying at Symonds' wharf in Southwark. The hemp was delivered to Swallow, at the desire of the plaintiff, by a transfer in the books of the wharfinger from the name of the seller to that of Swallow. Shortly afterwards Swallow purchased for the plaintiff another parcel of hemp, lying at Bowen's quay, Wapping, which latter parcel was transferred into the name of Pickering (the plaintiff) per Swallow. Both these parcels of hemp were duly paid for by the plaintiff. Swallow, however, while the hemp remained thus in his name, having contracted with Hayward and Co. as the broker of Busk and Co. for the sale of hemp, and having none of his own to deliver, transferred into the names of Hayward and Co. the above parcels in satisfaction of that contract, for which they paid him the value. Hayward and Co. shortly after became bankrupts: and the plaintiff, discovering these circumstances, demanded the hemp of the defendants their assignees, and upon their refusal to deliver it the present action was brought. His Lordship was of opinion upon this evidence that the transfer of the hemp, by direction of the plaintiff, into Swallow's name, authorized him to deal with it as owner, with respect to third persons; and that the plaintiff, who had thus enabled him to assume the appearance of ownership to the world, must abide the consequence of his own act. A verdict was thereupon found for the defendants, with liberty to the plaintiff to move to set it aside.

Lord ELLENBOROUGH, C. J.—It cannot fairly be questioned in this case but that Swallow had an implied authority to sell. Strangers can only look to the acts of the parties, and to the external indicia of property, and not to the private communications which may pass between a principal and his broker: and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade it must be presumed that the assumed authority is the real authority. I cannot subscribe to the doctrine, that a broker's engagements are necessarily and in all cases limited by his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently invested by the principal in respect of the subject-matter: and there would be no safety in mercantile transactions if he could not. If one principal send his commodity to a place, where it is the ordinary business of the person to whom it is confided to sell, to make an immediate sale

We do not think it necessary to inquire precisely what authority appellee, in fact, conferred upon his son in regard to his business, because in the opinion of the preponderance of the evidence is, that he was suffered to act as a general agent both in buying and selling, and the public were justified in assuming that he possessed all the authority usual to a general agent in buying and selling. It is true, as contended by counsel for appellee, that an authority to buy cannot be inferred simply from an authority to sell; yet where a party or the person has been accustomed to buy as well as to sell, the presumption of full authority is equally applicable to [illegible] Agency, § 80. By permitting another to hold himself out as [illegible] his agent, the principal adopts his acts, and will be bound as to the person who gives credit thereafter to the [illegible] of his agent. 2 Kent's Com. (8th ed.) 759.

It is [illegible] that the goods here ordered were not such [illegible] the business in which appellee was engaged, [illegible] the son had been suffered by contracts for [illegible] the trade.

[illegible] that the goods ordered were not such [illegible] in which appellee was engaged. [illegible] grocery, general stock; keep tobacco. [illegible] Benjamin Kindy, speaks of his having a "grocery and saloon."

No [illegible] ale and cigars, such as were ordered, [illegible] to such business, and we are not warranted in so [illegible] the absence of evidence.

We are of opinion that under the evidence before us, the judgment does [illegible] law, and that it should, therefore, be reversed. The judgment is reversed and the cause remanded.

[illegible]

[illegible] 5, Mich. 553.

"A principal is responsible [illegible] acts of one who is his agent, or appears [illegible] on the ground of apparent authority in the [illegible] principal has clothed the agent with the [illegible] power, and not where the agent's own conduct creates the appearance. Goode, [illegible] Charleston, 130 Mo. App. 23, 32.

"In estimating the extent of [illegible] authority, it is more important to look to the nature of the [illegible] accustomed to perform than to the name by which he is called. [illegible] are those of a manager or an assistant manager, [illegible] intrusted by his principal as a book [illegible] in a course of trading [illegible] had been held out as having authority to receive and to release a debt and to receive payment thereof, [illegible] merely clothed with [illegible] authority to that extent." Powell, [illegible] Insurance Co., 3 Ont. App. 202, 214.

See Goldberg Liebmann [illegible] American Insurance Co., 29 Wend. (N. Y.) 187.

PICKERING v. BUSK AND ANOTHER.

1812. COURT OF KING'S BENCH. 15 East 38.

TROVER for hemp. At the trial before Lord Ellenborough, C. J., at the sittings after Trinity term in London, it appeared that Swallow, a broker in London, engaged in the hemp trade, had purchased for the plaintiff, a merchant at Hull, a parcel of hemp then lying at Symonds' wharf in Southwark. The hemp was delivered to Swallow, at the desire of the plaintiff, by a transfer in the books of the wharfinger from the name of the seller to that of Swallow. Shortly afterwards Swallow purchased for the plaintiff another parcel of hemp, lying at Brown's quay, Wapping, which latter parcel was transferred into the names of Pickering (the plaintiff), or Swallow. Both these parcels of hemp were duly paid for by the plaintiff. Swallow, however, whilst the hemp remained thus in his name, having contracted with Hayward and Co. as the broker of Blackburn and Co. for the sale of hemp, and having none of his own to deliver, transferred into the names of Hayward and Co. the above parcels in satisfaction of that contract, for which they paid him the value. Hayward and Co. shortly after became bankrupts; and the plaintiff, discovering these circumstances, demanded the hemp of the defendants their assignees, and upon their refusal to deliver it the present action was brought. His Lordship was of opinion upon this evidence, that the transfer of the hemp, by direction of the plaintiff, into Swallow's name, authorized him to deal with it as owner, with respect to third persons; and that the plaintiff, who had thus enabled him to assume the appearance of ownership to the world, must abide the consequence of his own act. A verdict was thereupon found for the defendants, with liberty to the plaintiff to move to set it aside.

LORD ELLENBOROUGH, C. J.—It cannot fairly be questioned in this case but that Swallow had an implied authority to sell. Strangers can only look to the acts of the parties, and to the external indicia of property, and not to the private communications which may pass between a principal and his broker: and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine, that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect of the subject-matter; and there would be no safety in mercantile transactions if he could not. If the principal send his commodity to a place, where it is the ordinary business of the person to whom it is confided to sell, it must be intended that

the commodity was sent thither for the purpose of sale. If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one send goods to an auction-room, can it be supposed that he sent them thither merely for safe custody? Where the commodity is sent in such a way and to such a place as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser safe. The case of a factor not being able to pledge the goods of his principal confided to him for sale, though clothed with an apparent ownership, has been pressed upon us in the argument, and considerably distressed our decision. The court, however, will decide that question when it arises, consistently with the principle on which the present decision is founded. It was a hard doctrine when the pawnee was told that the pledger of the goods had no authority to pledge them, being a mere factor for sale; and yet since the case of Paterson v. Tash, that doctrine has never been overturned. I remember Mr. Wallace arguing, in Campbell v. Wright, 4 Burr. 2046, that the bills of lading ought to designate the consignee as factor, otherwise it was but just that the consignors should abide by the consequence of having misled the pawnees. The present case, however, is not the case of a pawn, but that of a sale by a broker having the possession for the purpose of sale. The sale was made by a person who had all the indicia of property: the hemp could only have been transferred into his name for the purpose of sale; and the party who has so transferred it cannot now rescind the contract. If the plaintiff had intended to retain the dominion over the hemp, he should have placed it in the wharfinger's books in his own name.

Grose, J.—The question, whether the plaintiff is bound by the act of Swallow, depends upon the authority which Swallow had. This being a mercantile transaction, the jury were most competent to decide it; and if I had entertained any doubt, I should rather have referred the question to them for their determination: but I am perfectly satisfied: I think Swallow had a power to sell.

Le Blanc, J.—The law is clearly laid down, that the mere possession of personal property does not convey a title to dispose of it; and, which is equally clear, that the possession of a factor or broker does not authorize him to pledge. But this is a case of sale. The question then is whether Swallow had an authority to sell. To decide this let us look at the situation of the parties. Swallow was a general seller of hemp; the hemp in question was left in the custody of the wharfingers, part in the name of Swallow, and part in the name of plaintiff or Swallow, which is the same thing. Now for what purpose could the plaintiff leave it in the name of Swallow, but that Swallow might dispose of it in his ordinary business as broker; if so, the broker having sold the hemp, the principal is bound. This is distinguishable from all the cases where goods are left in the custody of persons, whose proper business it is not to sell.

Bartol, J.—It may be admitted that no general and express authority to sell; but an implied authority may be given; and if a person puts goods into the possession of another whose common business it is to sell, without limiting his authority, he thereby confers an implied authority upon him to sell them. Swallow was in the habit of buying and selling hemp for others, executing their names. And now the plaintiff claims a right to rescind the contract, because no express authority was given to Swallow to sell. But is it competent to him so to do? If the servant of a horse-dealer, with express directions not to warrant the horse he sells, does warrant, the master is bound because the servant having a general authority to sell is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed. This case does not proceed to the ground of fraud, but in order to make out his case he proceeds on the principle, that the vendor having given Swallow an authority to sell, he is not at liberty afterwards, when they has been a sale, to deny the authority.

Rule discharged.

LISTER AND SUPPLEE v. ALLEN.

1869. COURT OF APPEALS OF MARYLAND. 31 Md. 542.

Appeal from the Baltimore City Court.

The facts are sufficiently detailed in the opinion of the court.

Bartol, C. J.—The appellee, plaintiff below, was entitled, under the laws of the state, as widow of Richard Allen, late a soldier in the United States army, to receive from the treasury the sum of three hundred dollars for bounty due the deceased.

Her claim, made out in due form of law, with the requisite affidavits and proofs annexed, was placed by her for collection in the hands of William E. Hanson, and appended thereto was the following order or draft:

"Where the one person is not present, or cannot hear or express, or not present, or as having the power of disposition over the property, and one person hands money to another dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or interest of the owner, with which they are directly but are derived from it, or on the fact whether purchaser was free from negligence in respect to the existence of the title or power which, through negligence or misplaced confidence, he trusted or allowed to appear to be vested in the party making the conveyance." Knight, J., in Mitchell v. Union National Bank, 33 N. Y. 424, 431.

The decision of Chancellor Kent was overturned into the Revised Statutes of New York, 2 Rev. St. 135, and 1 Edmonds's Statutes at Large, 481, and is now to be found in 2 Rev. St. (8th ed.) 1847, 1848, and Laws of New York 1848, c. 200, § 1, and Revised Statutes (Voorhies' Code), 1875, p. 1[illegible].

BAYLEY, J.—It may be admitted that the plaintiff did not give Swallow any express authority to sell; but an implied authority may be given; and if a person put goods into the custody of another whose common business it is to sell, without limiting his authority, he thereby confers an implied authority upon him to sell them. Swallow was in the habit of buying and selling hemp for others, concealing their names. And now the plaintiff claims a liberty to rescind the contract, because no express authority was given to Swallow to sell. But is it competent to him so to do? If the servant of a horse-dealer, with express directions not to warrant, do warrant, the master is bound; because the servant, having a general authority to sell, is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed. This case does not proceed on the ground of a sale in market overt, but it proceeds on the principle, that the plaintiff having given Swallow an authority to sell, he is not at liberty afterwards, when there has been a sale, to deny the authority.

Rule discharged.[1]

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1869. COURT OF APPEALS OF MARYLAND. 31 Md. 543.

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BARTOL, C. J.—The appellee, plaintiff below, was entitled under the laws of the state, as widow of Richard Allen, late a soldier in the United States army, to receive from the treasury the sum of three hundred dollars for bounty due the deceased.

Her claim, made out in due form of law, with the requisite affidavits and proof annexed, was placed by her for collection in the hands of William E. Hanson, and appended thereto was the following order or draft:

[1] "Where the true owner holds out another, or allows him to appear, as the owner of, or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance." Rapallo, J., in McNeil v. Tenth National Bank, 46 N. Y. 325, 329.

The decision of Pickering v. Busk was incorporated into the English Factor's Acts: 4 Geo. IV, c. 83, 5 and 6 Victoria, c. 39, § 4, and 52 and 53 Victoria, c. 45, § 1. See also Laws of New York, 1830, c. 179, § 3, and Massachusetts Public Statutes, c. 71, § 1.

"$300. 186—.

"The treasurer of the State of Maryland, pay to the order of William E. Hanson the sum of Three Hundred Dollars, being balance of state bounty due me as the widow of Richard Allen, a volunteer in Company H, in 30th Regiment, U. S. C. troops. Under the act of the general assembly of Maryland of 1864, chapter 15, and amendments thereto."

her
"Emeline + Allen."
mark.

"Witnessed by Jos. B. Ruth, J. P."

Evidence was offered to prove that Hanson paid nothing to the plaintiff for the claim; that he passed it over to one James Campbell, a bounty broker, but for what consideration does not appear. Campbell sold it to the appellants for $165, and they received the amount ($300) from the treasury. The object of the suit is to recover from them this sum, as money had and received for the use of the plaintiff.

At the trial the defendants asked the court to instruct the jury "that if they found the defendants purchased the claim for bounty in question at a fair market price, without any collusion with Hanson or his agent, and paid their money for the same, then the plaintiff is not entitled to recover."

This prayer was refused and the prayer of the plaintiff was granted, instructing the jury substantially, "that if they believed from the evidence the plaintiff placed her claim in the hands of Hanson, a claim agent, with an understanding that the same should be collected in the usual mode, and paid over to her, but without authority to sell the said claim, and that Hanson sold the same, or caused it to be sold, without her authority or consent, to the defendants, who afterwards collected the full amount from the state, then the plaintiff is entitled to recover said three hundred dollars, with interest from the date of its payment."

The jury found a verdict in favor of the plaintiff; and the appeal brings up for review the ruling of the court below on the prayers.

The defendants claim exemption from liability, on the ground that they were bona fide purchasers of the claim for value. But the court asserted the right of the plaintiff to recover, provided the jury found that Hanson was her agent only to collect, without any authority to sell, and if he sold without her knowledge or consent, the purchasers acquired no title as against her, although they may have acted in good faith.

In support of this position, we have been referred to Chitty on Contracts, 200, and to Batty v. Carswell, 2 Johns. 48, and Rossiter v. Rossiter, 8 Wend. 494 (24 Am. Dec. 62).

1850—

"The treasurer of the state of Maryland, pay to the order of William B. Hanson the sum of [illegible] Hundred Dollars, being balance of state bounty due to the widow of Richard Allen, a volunteer in Company [illegible] Regiment [illegible] Regulars. Under the act of the general assembly of Maryland of 1850, Chapter 15, and amendments thereto.

her
"[illegible] Allen,"
mark

"Witness to her [illegible]"

[illegible] Hanson paid nothing to the plaintiff [illegible] James Campbell [illegible] appear. Campbell [illegible] for State and [illegible] received the [illegible] The object of the suit [illegible] money had been received for the use of the plaintiff.

[illegible] asked the court to instruct the jury [illegible] purchased the claim for bounty in [illegible] without any collusion with Hanson [illegible] money for the [illegible] then the plaintiff [illegible]

[illegible] the proceeds of the plaintiff was [illegible] originally, [illegible] if they believed [illegible] placed her claim in the hands of Hanson [illegible] understanding that the same should be collected [illegible] paid over to her, but without authority [illegible] and that Hanson sold the same or caused it [illegible] privity or consent, to the defendants, who [illegible] the full amount from the State, then the plaintiff [illegible] and three hundred dollars, with interest [illegible]

The jury [illegible] of the plaintiff, and the appellant brings up for review the rulings of the court below on the prayers.

The defendants [illegible] on the ground that [illegible] for policy. But the court [illegible] the right of [illegible] over, provided the jury found [illegible] was [illegible], without any authority to [illegible] or consent, the purchasers acquired no title as [illegible] they may have acted in good faith.

In support of this [illegible] cited 1 Story Eq. Jurisp. 395; Chitty on Contracts, 390, and to the [illegible] Adams 98, and Kessler v. Bowles & Ward, 34 [illegible]

These authorities announce the doctrine that the acts of a special agent do not bind his principal, unless strictly within his authority.

Chitty states the rule as follows:

"If the agent is appointed only for a particular purpose, and is invested with limited powers, or, in other words, is a special agent, then it is the duty of persons dealing with such agent to ascertain the extent of his authority, and the principal or master will not be bound by any act of the agent not warranted expressly by, or by fair and necessary implication from, the terms of the authority delegated to him."

This general rule is correct; but in the application of it to cases affecting the rights of third persons who have dealt with the agent in good faith, care must be taken not to bind them by limitations placed on the authority of the agent by the private instructions of the principal, which are not known to such third persons, nor properly inferable from the nature of the agent's employment.

In Perkin's note to the text of Chitty, above quoted, page 200, it is correctly said: "A general authority arises from a general employment in a specific capacity, such as factor, broker, attorney, etc." * * * "A general authority of this kind empowers the agent to bind the employee by all acts within the scope of his employment, and that power cannot be limited by any private order or direction not known to the party dealing with the agent."

Judge Story, in his work on Agency, § 443, says:

"But the responsibility of the principal to third persons is not confined to cases where the contract has been actually made under his express or implied authority.

"It extends further, and binds the principal in all cases where the agent is acting within the scope of his usual employment, or is held out to the public or to the other party as having competent authority, although in fact he has, in the particular instance, exceeded or violated his instructions and acted without authority. For in all such cases, where one of two innocent persons is to suffer, he ought to suffer who misled the other into the contract by holding out the agent as competent to act, and as enjoying his confidence. * * *"

"So if the principal should clothe the agent, although a mere special agent, with all the apparent muniments of an absolute title to the property in himself, the principal would be bound by the acts of the latter; as, for example, if he should clothe him with the apparent title to property by a bill of lading of shipment, as by making the shipment appear to be an account of the agent, or should trust him with negotiable securities indorsed in blank, a sale or disposal thereof by the agent, although in violation of his private orders, would bind the principal, and give correspondent rights and remedies to third persons who became bona fide possessors under such sale or other act of disposal against him."

The principle thus stated by Judge Story is supported by the authority both of elementary writers and of adjudged cases, and seems to be applicable to the present case.

Hanson was acting as the attorney in fact for the plaintiff, she placed in his hands the evidence of her bounty claim, and by her written order on the treasurer directed that the same should be paid to the order of Hanson.

As between the original parties, the effect of this transaction was to constitute Hanson as the mere agent or attorney in fact of the plaintiff to collect the money; and he would be liable to her for any violation of duty by the sale or conversion of her property without her authority or consent. But it does not follow that such liability would attach to third persons who have dealt with the agent in good faith, with no other knowledge as to the limits of his agency except what the written papers disclose. On the contrary, the claim being in its nature assignable, as was decided in Eichelberger v. Sifford, 27 Md. 320, the possession by Hanson of the written evidence of the claim, and the order or check of the plaintiff thereon directing the same to be paid to his order, placed in his hands such muniments of title as authorized the appellants to deal with him as owner, or as having the power of disposition; and if they so dealt with him in good faith, and purchased for a valuable consideration, they are entitled to be protected against the claim of the principal, although Hanson may have violated his instructions.

In such case the loss must fall, not upon the appellants, but upon the plaintiff, who inadvertently, or perhaps ignorantly, placed it in the power of her agent, to violate her confidence, or to impose upon third persons.

If the plaintiff's check upon the treasurer, making the money payable to Hanson's order, be regarded as an ordinary negotiable security, then, by the law-merchant, the appellants, if they took it in good faith, and without notice of the nature of Hanson's agency, would clearly be entitled to protection as bona fide indorsees for value.

But without placing the case upon this ground, treating the claim as mere chose in action assignable, the appellants are equally entitled to protection, if they acquired the same bona fide and for value from Hanson or his agent, with no other notice of the rights of Hanson, or the nature of his agency, except that furnished by the papers themselves.

Being of opinion that there was error in the instruction given to the jury, the judgment will be reversed, with leave to the appellee to take out writ of *procendendo*.

Judgment reversed, with leave to take out *procendendo*.

Section 2.—Torts.

(a) TRESPASS AND TROVER.

BIRKETT v. POSTAL TELEGRAPH-CABLE COMPANY.

1903 APPELLATE DIVISION OF SUPREME COURT OF NEW YORK
79 App. Div. 145.

Appeal by the defendant, the Postal Telegraph-Cable Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the County of Yates on the 21st day of June, 1904, upon the report of a referee.

The appellant from 1899 to 1902 had in its employ as manager at Penn Yan, one Harrington. The business carried on at the defendant's office was quite extensive for a country village and the part contributed by the plaintiff was large. Harrington was in full control of the business for the defendant. A rule of the company required that he deposit the funds of the company in the bank "to no officer, more or to the credit of the company in its corporate name." He chose the first of these alternatives and deposited in the local bank to his credit as manager the money he received belonging to the defendant. He only had one account at the bank and checked against it to meet the expenses of the defendant at the Penn Yan office, including his own salary.

Harrington rendered itemized statements each month to the plaintiff on blanks furnished by the defendant for that purpose and the plaintiff paid him mainly by check as they were rendered.

In 1902 he accidentally discovered an overcharge which led to an investigation disclosing that he had been systematically robbing by Harrington, who confessed his guilt and absconded. The subsequent examination proved that the extent of these false accounts, consisting of fictitious items and excessive charges, was $2,170.

Harrington had remitted greater sums and rendered correct statements to the accounts to the defendant.

STRONG, J.—The rule of law governing this case is elementary. A principal is liable to a third person for the misconduct of his agent committed in the line of his employment, even though the offense was in excess of his authority "and the principal did not authorize, justify or know of it." (Nowack v. Met. St. Ry. Co., 166 N. Y. 153, 156; Jervis v. Manhattan Beach Co., 148 id. 132, 137 et seq.) Controlling this rule of law, the appellant contends that Harrington was not acting in the line of his employment in making false entries in the accounts rendered to the plaintiff. Harrington had general superintendence of the defendant's office at Penn Yan. He had the exclusive handling of its funds at that village. He was charged with the duty of rendering to the

Section 2.—Torts.

(a) FRAUD AND DECEIT.

BIRKETT v. POSTAL TELEGRAPH-CABLE COMPANY.

1905. APPELLATE DECISION OF SUPREME COURT OF NEW YORK. 107 App. Div. 115.

Appeal by the defendant, the Postal Telegraph-Cable Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the County of Yates on the 27th day of June, 1904, upon the report of a referee.

The appellant from 1899 to 1903 had in its employ as manager at Penn Yan, one Harrington. The business carried on at the defendant's office was quite extensive for a country village and the part contributed by the plaintiff was large. Harrington was in full control of this business for the defendant. A rule of the company required that he deposit the funds of the company in the bank "in his official name or to the credit of the company in its corporate name." He chose the first of these alternatives and deposited in the local bank to his credit as manager the money he received belonging to the defendant. He only had one account at this bank and checked against it to meet the expenses of the defendant at the Penn Yan office, including his own salary.

Harrington rendered itemized statements each month to the plaintiff on blanks furnished by the defendant for that purpose and the plaintiff paid him mainly by check as they were rendered.

In 1903 he accidentally discovered an overcharge which led to an investigation disclosing that he had been systematically mulcted by Harrington, who confessed his guilt and absconded. An extended examination proved that the extent of these false accounts, consisting of fictitious items and excessive charges, was $2,480.24.

Harrington had remitted proper sums and rendered correct statements of the accounts to the defendant.

SPRING, J.—The rule of law governing this case is elementary. A principal is liable to a third person for the misconduct of his agent committed in the line of his employment, even though the offense was in excess of his authority "and the principal did not authorize, justify or know of it." (Nowack v. Met. St. Ry. Co., 166 N. Y. 433, 440; Jarvis v. Manhattan Beach Co., 148 *id.* 652, 657 *et seq.*) Conceding this rule of law, the appellant contends that Harrington was not acting in the line of his employment in making false entries in the accounts rendered to the plaintiff. Harrington had general superintendence of the defendant's office in Penn Yan. He had the exclusive handling of its funds at that village. He was charged with the rendition of the accounts to the

plaintiff and with collecting for the telegrams and cablegrams sent by the plaintiff and upon which there were charges for transmission. He was acting within the scope of his agency in receiving the money for the benefit of the defendant. If the plaintiff had paid the exact amount due and Harrington had misappropriated it the plaintiff could not have been compelled to respond over again on account of the misconduct of Harrington. Of course, Harrington was not authorized to collect money of the plaintiff for telegrams never transmitted, but it was his duty to collect the sums actually due for their transmission. If he collected more than was due he did that because of his agency. The agent in his dealings with the plaintiff turned out to be dishonest while acting in that capacity. His delinquency does not exonerate the defendant to the plaintiff who relied upon the manifest authority of Harrington. The principal cannot so easily evade liability for the misdeeds of its agent. The general line of employment is fixed by the agency, and whatever an agent does to an innocent third person within that general line, although *ultra vires,* he represents his principal. If a conductor uses undue violence in removing a passenger from a train the railroad company is liable. The company does not authorize the conductor to handle the passenger harshly, but it does empower him in certain cases to eject the passenger, and it must be held civilly responsible for whatever the conductor does in carrying out the authority intrusted to him even though he oversteps his instructions. The rule here applicable is founded on the old maxim that the principal is responsible for his agent, not the innocent third person.

The plaintiff was furnished with the tariff books of the defendant, and by examination of each statement with the tariff rates could have ascertained that he was being cheated. It is urged that he was negligent in failing to make these examinations and should not, therefore, be permitted to recover. The plaintiff was not obliged to act on the assumption that Harrington was defrauding him. The defendant had placed its agent in the responsible position of manager of its business. It vouched for his integrity to its patrons. They had a right to assume he was honest and were not called upon to enter into any inspection of the items of his accounts for the purpose of discovering either fraud or mistake.

The judgment should be affirmed with costs.

All concurred.

Judgment affirmed, with costs.[1]

[1] Affirmed by Court of Appeals in 186 N. Y. 591.

Accord: McCord v. Western Union Telegraph Co., 39 Minn. 181. On page 185 Vanderburgh, J., says: "It was the business of the agent to send dispatches of a similar character, and such acts were within the scope of his employment, and the plaintiff could not know the circumstances which made the particular act wrongful and unauthorized. As to him, therefore, it must be deemed the act of the corporation."

HASKELL v. STARBIRD.

(52 Mass. 401.)

Fort for false and fraudulent representations in the sale of land.

At the trial in the Superior Court, before Bigelow, C. J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

Dewey, J.—There was evidence that the purchase of a certain tract of land in Canada, in which purchase the plaintiff alleges that he has been deceived, was made through one Rockwell, who acted as the agent for the defendant; and that the plaintiff was induced by the representations made by Rockwell that the land was to the value of twelve hundred dollars, contained a large amount of timber, and was adjacent to a flourishing village, which representations were false. There was also evidence that Rockwell made these representations as the agent of the defendant. Rockwell also testified that the defendant made these representations to him, that he therefore made them to the plaintiff, and that before the conveyance was made he informed the defendant that he had so made them. While the statements as to the value of the land might be treated as an expression of opinion only those in reference to the locality of the land and the amount of timber on it were statements of fact of importance to any one proposing to purchase it; nor does the land appear to have been readily accessible, so that their accuracy could have been tested by the plaintiff. The defendant denied that he ever made any representations concerning the condition or location of the land, and offered evidence that at the time the conveyance was made to him he informed the plaintiff that he had never seen the land and knew nothing about it except what he had been informed.

The defendant requested the court to instruct the jury as follows: 1. "If the jury shall find that Rockwell was the agent of the defendant in selling the land in question, and that in such agency he made the misrepresentations relied on, and that after the same were made, but at the time, but before the deed of the land was delivered, the defendant, in answer to inquiry made of him by the plaintiff, replied that he had never seen the land, and knew nothing about it except what had been told him, and the plaintiff without further inquiry accepted the deed and paid the consideration agreed on, his action cannot recover. 2. If the jury shall find that Rockwell was the agent of the defendant in selling the land in question, the plaintiff cannot recover unless it is proved that the defendant was privy to or adopted the misrepresentations relied on."

The court declined to give these instructions, and instructed the jury: "If the defendant employed and authorized Rockwell to sell the land, and in pursuance of that authority Rockwell said or did anything to induce the plaintiff to buy, and made false and

HASKELL v. STARBIRD.

1890. Supreme Judicial Court of Massachusetts. 152 Mass. 117.

Tort for false and fraudulent representations in the sale of land. At the trial in the Superior Court, before Brigham, C. J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

Devens, J.—There was evidence that the purchase of a certain tract of land in Canada, in which purchase the plaintiff alleged himself to have been deceived, was made through one Rockwell, who acted as the agent for the defendant; and that the plaintiff was deceived by the representations made by Rockwell that the land was of the value of twelve hundred dollars, contained a large amount of timber, and was adjacent to a flourishing village, which representations were false. There was also evidence that Rockwell made these representations as the agent of the defendant. Rockwell also testified that the defendant made these representations to him, that he therefore made them to the plaintiff, and that before the conveyance was made he informed the defendant that he had so made them. While the statement as to the value of the land might be treated as an expression of opinion, only those in reference to the locality of the land and the amount of timber on it were statements of fact of importance to any one proposing to purchase it; nor does the land appear to have been readily accessible, so that their accuracy could have been tested by the plaintiff. The defendant denied that he ever made any representations concerning the condition or location of the land, and offered evidence that at the time the conveyance was made by him he informed the plaintiff that he had never seen the land, and knew nothing about it except what he had been informed.

The defendant requested the court to instruct the jury as follows:

1. "If the jury shall find that Rockwell was the agent of the defendant in selling the land in question, and that as such agent he made the misrepresentations relied on, and that after the same were made, and at the time, but before the deed of this land was delivered, the defendant, in answer to inquiry made of him by the plaintiff, replied that he had never seen the land, and knew nothing about it except what had been told him, and the plaintiff without further inquiry accepted the deed and paid the consideration agreed on, he cannot recover. 2. If the jury shall find that Rockwell was the agent of the defendant in selling the land in question, the plaintiff cannot recover, unless it is proved that the defendant was privy to or adopted the misrepresentations relied on."

The court declined to give these instructions, and instructed the jury: "If the defendant employed and authorized Rockwell to sell the land, and in pursuance of that authority Rockwell sold the land and did induce the plaintiff to buy, and made false and

fraudulent representations about the land, upon which the plaintiff relied and which induced him to purchase, I shall instruct you that the defendant would be responsible for that fraud, notwithstanding there were no instructions given to Rockwell by the defendant which authorized him to make fraudulent representations, and notwithstanding the defendant did not know that he practised those fraudulent representations. Employing him as agent or as his agent to do that thing, he became responsible for the methods which his agent adopted in doing that thing. * * * If the representations were false in fact, and Rockwell had no knowledge personally of the truth of these representations, but derived his information from others upon those facts, he, or the person for whom he was acting as the agent in the same, would be liable to an action for deceit."

The first instruction requested and refused should not have been given. It was an instruction on only a part of the evidence, and omitted entirely any consideration of the important testimony of Rockwell, that he made the false representations acting as the defendant's agent, and upon his express authority, and also that the fact that they had been made was communicated to the defendant before the transaction was closed by the payment of the purchase money and the making of the conveyance. Even if the testimony of Rockwell was denied by the defendant, and controverted by other evidence, the instruction asked, if given, would have led the jury to infer that it was unimportant for them to consider this evidence, and that the mere fact that the defendant made the remarks testified to by him at the time of passing the deed would prevent the plaintiff from recovering, while it might be also that the plaintiff in completing the transaction depended upon the false and fraudulent representations of the defendant's agent made at the defendant's own instance.

The contention of the defendant is, that, the plaintiff having been put upon his guard by this conversation, he was affected by all the knowledge which he might have obtained if he had inquired further and elsewhere. But the defendant did not in the conversation in any way repudiate the representations of Rockwell, assuming them to have been made, or put the plaintiff on inquiry as to the correctness of them. On the contrary, the natural inference would be that the defendant adopted them, although he disclaimed personal knowledge. If it is true that these statements of Rockwell had been falsely and fraudulently made, and especially if made on the authority of the defendant himself, and if they had induced the plaintiff to make the purchase, the defendant cannot extricate himself from responsibility therefor by such a disclaimer.

The instructions of the court upon the second request for a ruling—which was in substance, that, even if Rockwell was the agent of the defendant to sell, the plaintiff could not recover unless it was proved that the defendant was privy to or adopted the misrepre-

sentations relied on—made the defendant responsible for the false and fraudulent representations as to the land made by Rockwell, if Rockwell was employed by the defendant to sell the land as his agent, notwithstanding Rockwell was not authorized to make them, and notwithstanding the defendant did not know that he had made them until after the conveyance. They held that the defendant, by employing Rockwell as his agent to make the sale, became responsible for the methods which he adopted in so doing. The defendant contends that Rockwell was a special agent only, and that, as his authority extended only to the sale of this single tract of land, the defendant is not responsible for any representations Rockwell might have made which he did not authorize.

The cases in which a distinction has been made in the responsibility of a principal for the acts of general and of special agents are those where the special agent did not have, and was not held out as having, full authority to do that which he undertook to do, and where one dealing with him was informed, or should have informed himself, of the limitations of his authority. There is no distinction in the matter of responsibility for the fraud of an agent authorized to do business generally, and of an agent employed to conduct a single transaction, if, in either case, he is acting in the business for which he was employed by the principal, and had full authority to complete the transaction. While the principal may not have authorized the particular act, he has put the agent in his place to make the sale, and must be responsible for the manner in which he has conducted himself in doing the business which the principal intrusted to him. Benjamin on Sales (3d Am. ed.), § 465. The rule that a principal is liable civilly for the neglect, fraud, deceit, or other wrongful act of his agent, although the principal did not in fact authorize the practice of such acts, is quoted with approbation by Chief Justice Shaw in Locke v. Stearns, 1 Met. 560. That a principal is liable for the false representations of his agent, although personally innocent of the fraud, is said by Mr. Justice Hoar, in White v. Sawyer, 16 Gray 586, 589, to be settled by the clear weight of authority.

In the case at bar, if the false representations were made by Rockwell, they were made by him while acting within the scope of his authority, in making a sale of land which the defendant employed him to sell, and the instruction properly held the defendant answerable for the damage occasioned thereby. Lothrop v. Adams, 133 Mass. 471. The defendant urges that, even if in an action of contract the false representations of Rockwell as his agent might render the defendant responsible as the principal, he cannot thus be made responsible in an action of tort for deceit, and that in such action the misrepresentation must be proved to have been that of the principal. It is sufficient to say that no such point was presented at the trial, nor do we consider that any such distinction exists.

If the instruction, "If the representations were false in fact," etc., is to be treated as an abstract proposition, intended to cover the whole case, and fully to state under what circumstances the defendant would be responsible, it would be obviously erroneous. It does not require that the representations should be fraudulent, as well as false, and it does not contain the additional and necessary element that the plaintiff should have been misled and deceived by them. It is not, however, to be thus treated, but must be considered in its connection with the part of the case and the subject upon which instructions had been asked. Both sides had tried the case upon the assumption that Rockwell had made statements that were false, and that were also fraudulent, either as regarded himself or the defendant. Rockwell had testified, on behalf of the plaintiff, that he had made these representations upon the authority of the defendant, and upon information derived from him, which statement had been denied by the defendant. The instructions asked related solely to the question of agency, and do not themselves use the word "false" or "fraudulent," but only the word "misrepresentations." The instruction given in response to the request was, that the defendant would be liable for false and fraudulent represention made by Rockwell, if he employed him to sell the land, and if the latter made them under the defendant's authority in selling it. The correctness of the instructions on this point we have already considered. When, therefore, the presiding judge dealt with the liability of the defendant for representations made by Rockwell on the information of others,—the only information of Rockwell, so far as the case shows, being derived from the defendant,—he was dealing with false and fraudulent representations, by which the plaintiff was deceived, although in such case the falsity and fraud would be those of the defendant acting through Rockwell as his instrument. The part of the case to which this instruction, as well as the former ones relate, assumes that the representations were of such a character that the defendant was liable therefor, if he was liable for the misrepresentations of Rockwell. Whether those representations themselves, in the terms in which they were made, were sufficient to make the defendant liable, belonged to another part of the case, not then under discussion, and to facts as to which appropriate instructions were given.

It is not a fair interpretation of the last instruction to hold, as the defendant contends, that it would allow the plaintiff to recover if there had been a representation erroneous in fact, and yet not knowingly so made, either by Rockwell, or by the defendant acting through Rockwell, nor do we think it could have been so understood.

Exceptions overruled.[1]

[1] *Accord:* Rhoda v. Annis, 75 Me. 17; Jeffrey v. Bigelow, 13 Wend. (N. Y.) 518; Darks v. Scudders-Gale Grocer Co. (Mo.), 130 S. W. 430.
See Fidelity Funding Co. v. Vaughn, 18 Okla. 13.

KENNEDY v. McKAY, REID AND HALLIARD.

1881. SUPREME COURT OF NEW JERSEY. 43 N. J. L. 288.

ON rule to show cause why a new trial should not be granted.

BEASLEY, C. J.—This is a suit bottomed on an alleged fraud committed by the defendants, in the sale of forty shares of the stock of the State Insurance Company to the plaintiff. The supposed deceit consisted in unfounded representations as to the financial condition of that company. The stock, at the time of the sale, was standing on the corporate books in the name of the defendant McKay, and the sale was effected by the two other defendants, and who, if the plaintiff's testimony was to be credited, made the statements which the jury has found were fraudulent. Halliard, one of the defendants, permitted judgment by default to be taken against him, and the verdict has implicated all of the three defendants in the deceit of the transaction.

But this finding, so far as Mr. McKay is concerned, seems to me not to be justified by the evidence. I have altogether failed to find any testimony that connects him, in respect to any material particular, with this affair. It is quite conclusively shown that the stock in question was put on the books of the corporation in the name of Mr. McKay, without his knowledge or consent. Halliard, the president of the insurance company, had purchased these shares, with sundry others, with the moneys of the company, and, wishing to keep them outstanding, had resorted to the device of transferring them to the name of Mr. McKay without asking his consent or apprising him of the step thus unwarrantably taken. This was the situation when the sale in question was made by Halliard and Reid, the latter then being the secretary of the insurance company. Both Reid and McKay testified that to the time of this event the latter had no intimation from any source that he was the colorable owner of this stock, and that he had no knowledge whatever that the plaintiff was minded to become a purchaser of any part of the stock of this corporation. If it be true, therefore, that Halliard and Reid, in selling this property to the plaintiff, represented it as McKay's stock, and, with a fraudulent intent, made false statements touching the financial condition of the company, such misconduct could not affect the defendant McKay. In the presence of this direct evidence, the circumstance relied on to connect him with the ownership of

Regarding measure of damages in an action against the principal for the fraud of the agent, see Kell v. Trenchard, 142 Fed. 16.

"If defendant's agent, even without her authority, made false representations of a material character, while acting in her behalf, she would be bound thereby if she afterwards ratified his action and received the benefit thereof." Howk, J., in Du Souchet v. Dutcher, 113 Ind. 249, 254.

this stock or its sale, are of too uncertain an import to have any controlling effect. They do not raise, in my mind, even a suspicion that he was implicated in this matter.

But even if we were to assume that this stock was, in reality, the property of McKay, and that Halliard and Reid were his agents to make sale of it, still it is not apparent on what legal theory this present action could be sustained. To support this suit against McKay fraud must be imputable to him, and the case is entirely destitute of all testimony tending to show that he authorized, or was privy to the utterance of the false representations in question. On the ground thus assumed, then, the case would be that of a sale made by fraud-doing agents in behalf of an innocent vendor. Whatever uncertainty may at one time have prevailed in regard to the legal incidents of such a position, such uncertainty no longer exists, and the rights, under the given circumstances, of both vendor and vendee, have been plainly defined, and, as I think, firmly settled by recent judicial decisions. In the light of such authorities it is clear that an innocent vendor cannot be sued in tort for the fraud of his agent in effecting a sale. In such a juncture the aggrieved vendee has, at law, two, and only two, remedies; the first being a recession of the contract of sale and a reclamation of the money paid by him from the vendors, or a suit against the agent, founded on the deceit. But in such a posture of affairs, a suit based on the fraud will not lie against the innocent vendor, on account of the deceit practiced without his authority or knowledge, by his agent. If the situation is such that the vendee can make complete restitution, so as to put the vendor in the condition with respect to the property sold that he was in at the time of the sale, he has the right to rescind such contract of sale, and if the vendor, on a tender to that effect, refuses to return the money received in the transaction, a suit will lie for such money, but such refusal on the part of the vendor will not make him a party to the original wrong, so that he can be sued for the deceit. This is the doctrine declared with much clearness and force by Barons Bramwell and Martin, in the case of Udell v. Atherton, 7 H. & N. 172, and their views on this subject were concurred in, and the principle propounded by them and adopted and enforced by the House of Lords in Western Bank of Scotland v. Addie, L. R., 1 Sc. App. 146. In this latter case the action was against the bank for deceit, which was alleged to consist in certain fraudulent represenattions, charged to have been made on a sale of stock to the plaintiff by the directors of such corporation as its agents. Lord Chelmsford, in giving his views, said: "The distinction to be drawn from the authorities, and which is sanctioned by sound principle, appears to be this: Where a person has been drawn into a contract to purchase shares belonging to a company, by fraudulent misrepresentations of the directors, and suit is brought in the name of the company to seek to enforce that con-

tract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, because the company cannot retain any benefit which they have obtained through the fraud of their agents. But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract prefers to bring an action of damages for the deceit, such an action cannot be sustained against the company, but only against the directors personally." Lord Cranworth, in his opinion, puts himself on the same ground, and says: "A person defrauded by the directors, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, must seek his remedy against the directors personally." It is obvious that the doctrine embodied in this decision, which is of so great weight as to be almost entitled to stand as authoritative in this court, if applied to the present case will have the effect of taking from the plaintiff's suit so far as it relates to Mr. McKay, every semblance of a foundation. By bringing his action in its present form the plaintiff has given up all idea of a rescission of the contract of sale, and the consequence is that, acording to the doctrine of the cases cited, he must connect this last-named defendant with the fraud by which the sale was effected, if he would obtain a judgment against him. But in this he has altogether failed.

The rule should be made absolute.[1]

MATTESON v. RICE.

1903. Supreme Court of Wisconsin. 116 Wis. 328.

Appeal from a judgment of the superior court of Milwaukee county: J. C. Ludwig, Judge. Reversed.

This in an action to recover damages suffered by plaintiff by reason of the alleged false and fraudulent representations of defendant's agent. The complaint sets out the facts substantially as hereinafter stated, and alleges that the representations made by the agent were made fraudulently, and for the purpose of inducing plaintiff to rent said flat. The case was tried before a referee, who made findings as follows:

"(1) That in 1897 the plaintiff leased a flat contained in a building belonging to the defendant, at or near the corner of Eighteenth street and Fond du Lac avenue, in the city of Milwaukee, and occupied the same as a tenant of the defendant under and pursuant

[1] *Accord:* Keefe v. Sholl, 181 Pa. St. 90.

to said lease until the building, including said flat, was destroyed by fire, in December, 1898, at which time all of the plaintiff's property contained in said flat was destroyed.

"(2) That plaintiff made his contract or lease with one August Klempke, who was at that time the janitor of the said flat building, and employed by the defendant, and that the entire business of leasing said flat to the plaintiff, on the part of the said defendant, was attended to and conducted by the said August Klempke.

"(3) That it was a part of Klempke's duties as an employee of the defendant to show the flats in the said building to prospective tenants, to tell them the amount of rent charged for such flats, and, in case of acceptance by such prospective tenants of the terms offered, to put them into possession, collect the first month's rent, and pay it over to the defendant; the subsequent rent being paid to or collected by the defendant's book-keeper.

"(4) Adjoining the said flat occupied by the plaintiff, and a part of the same building, was a store, also owned by the defendant. At the time the plaintiff rented said flat, he asked Klempke how it would be in case there should be a fire in said store; and said Klempke told him (plaintiff) that there was a fireproof wall between the said store and the flat about to be rented, and which was afterwards rented, by said plaintiff as aforesaid.

"(5) That the plaintiff relied upon said statement to the effect that there was a fireproof wall between said store and said flat, and believed the same to be true, and that he would not have rented the said flat, or continued to occupy the same, except for said statement, and except for his belief, induced by said statement, that there was a fireproof wall between said flat and said store.

"(6) That the partition wall between the said store and the said flat was not a fireproof wall, and was not a wall which could be considered a fireproof wall or a firewall, in any sense in which such term or terms could reasonably be understood, but consisted of a single thickness of brick, between upright wooden supports.

"(7) That said Klempke had no intention of defrauding the plaintiff in making said statement as aforesaid, but believed the said statement to be true.

"(8) That said partition or wall between the said store and said flat was covered with plaster on both sides, and the true character thereof was not open to examination or inspection by the plaintiff.

"(9) That had there been a firewall or a fireproof wall between said store and said flat, as was represented by said Klempke, the said fire probably could and would have been confined to the store building, and in that case the plaintiff's property contained in said flat would not have been destroyed.

"(10) That said Klempke was not expressly authorized or instructed by the defendant or anyone else to make any warranties or representations in regard to the said building, or as to the con-

struction of any part thereof, and that the statements made by said Klempke in reference to the character of said wall were not known to the defendant until after said fire had occurred."

The referee's conclusions were that it was not within the scope of the authority of Klempke, as defendant's agent, to make any representation or warranties respecting the construction of the building, and that there was no liability on the part of defendant by reason of such representations. Judgment was ordered for the defendant. A motion to modify such findings was denied, and the report was confirmed by the trial court. No bill of exceptions was settled and the case is brought here for review on plaintiff's appeal upon the pleadings and findings.

BARDEEN, J.—An inspection of the complaint and findings discloses that defendant's agent, Klempke, made false representations as to the character of defendant's building. The plaintiff relied thereon. From the character of the building, it was impossible for plaintiff to ascertain the truth of such representations. Because the fact represented was not true, plaintiff suffered loss. Defendant's agent had authority to show the flats, make leases, put tenants in possession, and collect the first month's rent. He had no express authority to make any "warranties or representations" in regard to the construction of the building, and he had no intention of deceiving plaintiff, and believed the statement he made to be true.

It must be understood at the outset that we are not dealing with the question of the authority of an agent to make warranties for his principal. A warranty, if false, gives rise to an action on contract. That is not this case. If we understand the complaint, the plaintiff sues to recover damages because of certain false representations made by the defendant's agent. A warranty is a collateral undertaking by which the warrantor contracts that certain facts in relation to the property are or shall be as he represents them. 28 Am. & Eng. Ency. of Law, 728. The same authority, on page 739, says:

"The terms 'warranty' and 'representation' are not synonymous. A warranty is always a representation, but the reverse is not necessarily true, the first being a more comprehensive term."

This case seems to have become divested of any element of contract, and turns upon the question whether the representations made by Klempke were within the apparent scope of his employment. An agent's authority to warrant, as said in Westurn v. Page, 94 Wis. 251, 68 N. W. 1003, must arise from express authority, or proof that the transaction is usually attended with warranty. Cases may and frequently do arise where the agent may have no authority to warrant, and yet, from the character of his agency, his principal may be held liable in tort for false representations made by him. This distinction may seem somewhat fine and inconsistent, yet it is nevertheless one amply recognized by the courts, and frequently enforced. It arises from the character and duty of the agent in relation to the

particular business in his charge. The general liability of the principal is as stated in the late case of Hoyer v. Ludington, 100 Wis. 441, 76 N. W. 348, where the following language was used:

"There is no doubt of the general proposition that if an agent is employed to effect the sale of lands for his principal, and he does so by means of false representations in respect to the land conveyed, even without the authority or knowledge of his principal, the latter is chargeable with such fraud in the same manner as if he had known or authorized the same. Law v. Grant, 37 Wis. 548; McKinnon v. Vollmar, 75 Wis. 82, 43 N. W. 800; Gunther v. Ulrich, 82 Wis. 222, 52 N. W. 88. And this is especially so when the principal accepts and enjoys the benefits of the purchase. Fintel v. Cook, 88 Wis. 487, 60 N. W. 788. But even then 'the representation which is to bind the principal must be made in reference to the subject-matter of his agency; it must be made while the agent is acting as such; and the making of such representation must be within the apparent scope of his authority.' Mechem, Ag. § 743."

In Law v. Grant, 37 Wis. 548, the rule in such cases was stated with great strictness. It was there said:

"If the agent effected it [the sale] by means of false representations or fraud of any other description, although without authority from the plaintiff to do so, and although the plaintiff was entirely ignorant that he had done so, the legal status of the plaintiff is precisely the same as it would have been had he made the false representations, or committed the fraudulent act to the same end, in person."

It seems to have been assumed that the acts done or representations made in that case were within the apparent scope of the agent's authority. The agent represented that valuable minerals had been found on the land. If the principal was bound by such representations, it is not difficult to see in this case that defendant was responsible for the representations as to the firewall. The representation of the existence of such wall was one of the inducements that led the plaintiff to make the lease he did. In the one case the representation of a mineral discovery induced the sale, and in the other the representation of the existence of a firewall induced the lease. The one seems to have been as much within the scope of the agent's employment as the other. The representation as to the existence of the firewall referred to the safety and condition of the premises. If it existed, the fact was an inducement to plaintiff to make the lease he did. Suppose plaintiff had asked the agent whether the roof leaked or the plumbing was in good condition; would not the agent have had implied authority, from the fact that he stood representing the owner, to have made answer to such questions? The difficulty experienced in cases of this kind is as to the proper understanding of the phrase "within the scope of his agency." It cannot properly be restricted to what the parties in-

tended in the creation of the agency. Nor can the question be determined by the authority intended to be conferred by the principal. As stated in some of the cases, we must distinguish between the authority to make the representations which amount to a fraud, and the authority to transact the business in the course of which the fraudulent act was committed. Tested by reference to the intention of the principal, it might be conceded that the making of representations culminating in fraud was not within the scope of the agency; but, tested by the connection of the act with the property and business of the agency, we find a direct connection between such act and business, and that the act was done by virtue of the authority of the agent in the particular matter. See Reynolds v. Witte, 13 S. C. 5. The scope of the agent's authority reaches out, and permits him to do such acts and things as are directly connected with and essential to the business in hand. He may not do everything his principal may do, but where the matter in controversy directly appertains to and becomes a necessary part of the transaction under consideration, and an inducement to the acceptance of the deal by the party to whom the representations are made, then we may say that it falls "within the scope of the agency." If the principal had been present, showing his building, with a view of leasing, inquiries regarding the danger of fire, the condition of plumbing, and the like, from the lessee, would have been perfectly natural and in accordance with ordinary business foresight. Any false answer material to such inquiries, and affecting the proposed tenancy, would have made the principal liable. Substitute the agent with authority to lease; how is the situation changed? The considerations mentioned were germane to the transaction. They operated as an inducement to the making of the lease, and the referee has found that, if the representations had not been made, the lease would not have been entered into. The fact that the agent had power to make the lease gave him authority to answer such questions regarding the nature and construction of the building as were not evident to the senses of a prospective tenant. Such authority arises from the nature of the transaction and the enforced reliance of the tenant upon the agent's answers. The fact that the agent believed such representations to be true, and had no intention to deceive the tenant, does not lessen defendant's liability. That question was settled early in the history of the jurisprudence of this state, and some of the cases are mentioned in Davis v. Nuzum, 72 Wis. 439, 40 N. W. 497. The subject is discussed in McKinnon v. Vollmar, 75 Wis. 82, 43 N. W. 800, where a sub-agent pointed out the wrong land to the purchaser, and where false representations were made as to the amount of timber thereon. In Gunther v. Ulrich, 82 Wis. 222, 52, N. W. 88, the agent of the vendors made a false statement as to the location of their lots, whereby the vendee was induced to purchase the same. The vendors were held liable for such misrepresentation by the agent,

whether intentional or not. If an agent to sell has authority to point out the location of the land he desires to sell, it is difficult to see why an agent to lease has not authority to describe the building and its surroundings which he desires to lease. See Porter v. Beattie, 88 Wis, 22, 59 N. W. 499; Beetle v. Anderson, 98 Wis. 5, 73 N. W. 560; Krause v. Busacker, 105 Wis. 350, 81 N. W. 406; Hart v. Moulton, 104 Wis. 349-359, 80 N. W. 599. As already suggested, such authority seems to fall naturally from the relation of the parties, the nature of the business intrusted to the agent, and the circumstances found by the referee.

In this view, the conclusions of the referee and the trial court were erroneous and the judgment must be reversed. There being no bill of exceptions, and no finding as to the amount of the plaintiff's loss, the court below is directed, if necessary, to take further testimony upon the subject, to determine the amount of such loss, and to enter judgment therefor for the plaintiff.

By the court.—So ordered.

FRIEDLANDER v. TEXAS AND PACIFIC RAILWAY COMPANY.

1888. Supreme Court of the United States. 130 U. S. 416.

Friedlander & Co. brought suit in the district court of Texas, in and for the county of Galveston, against the Texas and Pacific Railway Company, to recover for the non-delivery of certain cotton named in an alleged bill of lading hereinafter described, of which they claimed to be assignees for value, their petition after counting upon said bill of lading, thus continuing:

"That the said defendant, fraudulently contriving to avoid its liability to these plaintiffs, pretends and alleges that the said cotton was not so delivered as in and by said bill of lading is recited and acknowledged, but that the said bill of lading was executed without the receipt by its said agent of any of said cotton, all of which said pretences on the part of the defendant, plaintiffs allege are untrue; but they say that even if it be true that no cotton was delivered to said defendant as in and by said bill of lading is recited and acknowledged, yet is the defendant estopped from setting up that fact in defence of plaintiff's cause of action upon said bill of lading, because these plaintiffs say that the said bill of lading was executed in form negotiable and transferable by indorsement under the usage and customs of merchants, and that these plaintiffs, relying upon the validity of said bill of lading in all respects and upon the facts therein stated, that said cotton had been delivered to said defendant

[illegible] authority to sell the land he desires to sell, it is difficult to see why an agent is not [illegible] necessary to destroy the building and its appurtenances. [illegible] Beard, 88 Wis. 22, [illegible] Sunday v. Anderson, 98 Wis. 5, 73 N. W. 560; Kramer [illegible] Wis. 330, 80 N. W. 400; Harris v. Moulton, 104 [illegible] W. 309. As already suggested, such authority appears [illegible] from the relation of the parties, the nature of the [illegible] contract to the agent, and the circumstances found by the [illegible].

In this case [illegible] the referee and the trial court were erroneous [illegible] be reversed. There being no bill of exceptions [illegible] to the amount of the plaintiff's loss, the court should [illegible] necessary to take further testimony upon the question [illegible] amount of such loss, and to enter judgment [illegible] for the plaintiff.

By the Court.—[illegible]

FRITZ-CRAMER & [illegible] v. TEXAS AND PACIFIC RAILWAY COMPANY.

(No. [illegible]. Submitted [illegible], 1893. Decided [illegible], 1893. 150 U. S. 416.)

Fritz-Cramer & Co. [illegible] suit in the district court of Texas, in and for the county of [illegible], against the Texas and Pacific Railway Company, to recover for the nondelivery of certain cotton alleged in the alleged [illegible] described, of which they claimed to be [illegible] value, their petition [illegible] counting upon said bill of lading [illegible] counts:

"That the said defendant [illegible] corporation, to avoid its liability to these plaintiffs [illegible] and alleges that the said cotton was not so delivered as [illegible] and bill of lading is recited and acknowledged, but [illegible] or lading was accepted without the consent of the said [illegible] of said cotton, all of which said premises [illegible] the part of the [illegible] plaintiffs allege are untrue; [illegible] that [illegible] that no cotton was delivered to said [illegible] as in said [illegible] of lading is recited and acknowledged, yet [illegible] estopped from setting up that fact in [illegible] of plaintiff's [illegible] upon said bill of lading, because [illegible] of plaintiffs [illegible] that the said bill of lading was executed in [illegible] usage and [illegible] of [illegible] and [illegible] plaintiffs, relying upon the validity of said bill of lading [illegible] and upon the facts therein stated, [illegible] said cotton [illegible] delivered to said defendant

as aforesaid, and that defendant had contracted to carry and deliver said cotton as aforesaid, advanced to the said Joseph Lahnstein and paid out upon his order and at his request and in consideration of his said transfer of said bill of lading to these plaintiffs the sum of eight thousand dollars on, to wit, the 10th day of November, 1883, and that said payment was made and advanced upon the faith of the recitals and effect of said bill of lading as a contract to deliver the cotton therein mentioned as aforesaid, and that if the said cotton was never received by defendant, yet ought it to be held to the terms of the said bill of lading for the indemnification of these plaintiffs for said payment, with interest thereon from the date thereof, because of the fraud practised by the said agent upon these plaintiffs in the issuance of said bill of lading in the ordinary form and manner wherein he was authorized by the defendant to act, and defendants are estopped to deny that said cotton was received as against the claims of these plaintiffs for damages on account of defendant's failure to comply with said bill of lading to the extent of eight thousand dollars, with interest thereon, at the rate of 8 per cent. per annum, from the date of payment thereof as aforesaid; and if it be true, as alleged, that defendant receive said cotton in said bill of lading mentioned, then plaintiffs claim of defendant the full value thereof, to wit, the sum of fifteen thousand dollars, with interest thereon from and after the 6th day of December, 1883, when and before which time defendant should have delivered said cotton under said bill of lading, according to the true intent and meaning thereof."

Defendant demurred, and also answered, denying "all and singular the allegations in the petition contained." The case was subsequently removed to the Circuit Court of the United States for the Eastern District of Texas, whereupon by leave the defendant amended its answer by adding these further averments:

"That one E. D. Easton, on the 6th of November, 1883, was the station agent of defendant at Sherman station, in Grayson county, Texas, on the eastern division of defendant's line in Texas, and that as such agent he was authorized to receive cotton and other freight for transportation and to execute bills of lading for such cotton and other freight by him received for the purpose of transportation by defendant.

"That on the said 6th day of November, 1883, the said Easton, combining and confederating with one Joseph Lahnstein, did fraudulently and collusively sign a certain bill of lading purporting to be his act as agent of defendant, whereby he falsely represented that defendant had received from the said Joseph Lahnstein two hundred bales of cotton in apparent good order, to be transported from Sherman to New Orleans, La., and did deliver the said false bill of lading to the said Joseph Lahnstein; and defendant says that in point of fact the said bill of lading was executed by the said Easton

fraudulently and collusively with the said Lahnstein without receiving any cotton for transportation, such as was represented in said bill of lading, and without the expectation on the part of the said Easton of receiving any such cotton; that the said pretended bill of lading was the one that is set out in the petition of the plaintiffs, and was false, fraudulent and fictitious, and was not executed by defendant nor by its authority, and that the said Easton only had authority as agent aforesaid to execute and deliver bills of lading for freights actually received by him for transportation."

The cause was submitted to the court for trial, a jury being waived, upon the following agreed statement of facts:

"1st. On November 16, 1883, at Sherman station, in Grayson county, Texas, on the eastern division of the Texas and Pacific Railway Company, E. D. Easton, agent for the defendant at said station, executed as such agent a bill of lading, of which a copy is hereinafter given, and delivered the same to Joseph Lahnstein, the person named in said bill of lading.

"2nd. That said Easton was at the time and place aforesaid the regularly authorized agent of the defendant for the purpose of receiving for shipment cotton and other freight for transportation by defendant over and along its line from Sherman station aforesaid, and that said bill of lading was in the usual form and made out upon the usual printed blanks in use by said defendant at said station, and that said Easton was authorized by said defendant to execute bills of lading for cotton and other freight by him received for the purpose of transportation by the defendant.

"3d. That the said Joseph Lahnstein indorsed said bill of lading by writing his name across the back thereof and drew a draft on the plaintiffs in this cause on or about November 6, 1883 (of which draft a copy is hereinafter given), for the sum of eight thousand dollars, payable at sight to the order of Oliver & Griggs, and attached said draft to said bill of lading so indorsed, and on or about November 6, 1883, forwarded the same through said Oliver & Griggs for presentation to and payment by the plaintiffs in this cause; that in due course of business Oliver & Griggs forwarded said draft, with bill of lading attached, to New Orleans, where the same was presented to and paid by plaintiffs on or about November 10, 1883.

"4th. That in paying said draft said plaintiffs acted in good faith and in the usual course of their business as commission merchants making advances upon shipments of cotton to them for sale, and without any knowledge of any fraud or misrepresentation connected with said bill of lading and draft, and with the full and honest belief that said bill of lading and draft were honestly and in good faith executed, and that the cotton mentioned in said bill of lading had been in fact received by said defendant as represented in said bill of lading.

"5th. That plaintiffs had previously paid one or more drafts upon similar bills of lading signed by the said Easton at said time and for cotton shipped thereby to said Union Cotton Co. &c. by plaintiffs as consignees thereof for account of said Union Cotton Co., and that the cotton so previously advanced upon was received by plaintiffs in the due course of consignment and pursuant to the terms of the bills of lading upon which they made advances respectively, and the bill of lading of September 6, 1883, was not so received by plaintiffs from said Lalance and are entitled to be reimbursed.

"6th. That, in point of fact, said bill of lading of September 6, 1883, was executed by said E. D. Easton fraudulently and in collusion with said Lalance and without receiving any cotton for transportation as such as is represented in said bill of lading, and without the expectation on the part of the said Easton of receiving any such cotton; that said Easton and said Lalance had fraudulently combined in the other case, whereby said Easton agreed and delivered to the said Lalance a similar bill of lading for three hundred bales of cotton which had not been received, and which the said Easton had no expectation of receiving, like latter-named bill of lading having been given early in November, 1883, but that plaintiffs in the said suit had no knowledge whatever of the facts stated in this [fifth] clause until after they had in good faith paid and advanced upon the bill of lading sued on and the cotton thereto attached, to their protest as above said, to the sum of $8,000, as hereinbefore stated.

"7th. That the certain instrument in said bill of lading [of September 6, 1883], had the same been actually received by said Lalance and forwarded to plaintiffs, would have been worth legally more than the amount so advanced by said plaintiffs as aforesaid—that is to say, would have been worth about $10,000; but that, owing to the fact that the cotton was not received nor expected to be received by said agent when said bill of lading was by him executed, as aforesaid, no transaction was, from first to last, necessary and in the usual course of trade, and in accordance with the usage and customs of merchants and shippers and receivers of cotton.

"8th. That on said November 1, 1883, and long prior thereto, and ever since, the headquarters and main offices of defendants were and have been connected by telegraph communication with all stations on defendant's railroad and with Sherman station aforesaid, among others.

"9th. That the defendant is a corporation created and existing and domiciled as averred in the petition.

"10th. That on November 10, 1883, said Joseph Mellersh's estate was insolvent, and that he has been insolvent ever since and is now."

These bills of lading referred to Lalance and were sold

"5th. That plaintiffs had previously paid one or more drafts upon similar bills of lading, signed by the said Easton as agent aforesaid, for cotton shipped them by said Joseph Lahnstein, for sale by plaintiffs as commission merchants for account of said Joseph Lahnstein, and that the cotton so previously advanced upon was received by plaintiffs in the due course of transportation, pursuant to the terms of the bills of lading upon which they made advances respectively, and the bill of lading of November 6, 1883, was the first received by plaintiffs from said Lahnstein and not fulfilled by defendant.

"6th. That, in point of fact, said bill of lading of November 6, 1883, was executed by said E. D. Easton fraudulently and by collusion with said Lahnstein and without receiving any cotton for transportation, such as is represented in said bill of lading, and without the expectation on the part of the said Easton of receiving any such cotton; that said Easton and said Lahnstein had fraudulently combined in one other case, whereby said Easton signed and delivered to the said Lahnstein a similar bill of lading for three hundred bales of cotton which had not been received, and which the said Easton had no expectation of receiving, the latter-named bill of lading having been given early in November, 1883, but that plaintiffs in this suit had no knowledge whatever of the facts stated in this (sixth) clause until after they had in good faith paid and advanced upon the bill of lading sued on and the draft thereto attached, to them presented as aforesaid, the sum of $8,000, as hereinbefore stated.

"7th. That the cotton mentioned in said bill of lading (of November 6, 1883), had the same been actually received by defendant and forwarded to plaintiffs, would have been worth largely more than the amount so advanced by said plaintiffs as aforesaid—that is to say, would have been worth about $10,000, and that, except that the cotton was not received nor expected to be received by said agent when said bill of lading was by him executed as aforesaid, the transaction was, from first to last, customary and in the usual course of trade, and in accordance with the usage and customs of merchants and shippers and receivers of cotton.

"8th. That on said November 6, 1883, and long prior thereto and ever since, the headquarters and main offices of defendant were and have been connected by railroad and telegraph communication with all stations on defendant's railroad and with Sherman station aforesaid, among others.

"9th. That the defendant is a corporation created and existing and domiciled as alleged in the petition.

"10th. That on November 10, 1883, said Joseph mentioned above was insolvent, and that he has been insolvent ever since and is so now."

Then follows bill of lading, indorsed by Lahnstein and with draft

of Friedlander & Co. for $8,000 attached, acknowledging the receipt from Joseph Lahnstein of "two hundred bales of cotton in apparent good order, marked and numbered as below, to be transported from Sherman to New Orleans, La., and delivered to the consignees or a connecting common carrier," and proceeding in the usual form, Lahnstein being named as consignee, and directions given, "Notify J. Friedlander & Co., New Orleans, La." The circuit court found for the defendant, and judgment was rendered accordingly, and writ of error thereupon brought to this court.

FULLER, C. J.—The agreed statement of facts sets forth "that, in point of fact, said bill of lading of November 6, 1883, was executed by said E. D. Easton, fraudulently and by collusion with said Lahnstein and without receiving any cotton for transportation, such as is represented in said bill of lading, and without the expectation on the part of the said Easton of receiving any such cotton;" and it is further said that Easton and Lahnstein had fraudulently combined in another case, whereby Easton signed and delivered to Lahnstein a similar bill of lading for cotton "which had not been received, and which the said Easton had no expectation of receiving;" and also "that, except that the cotton was not received nor expected to be received by said agent when said bill of lading was by him executed as aforesaid, the transaction was, from first to last, customary." In view of this language, the words "for transportation, such as is represented in said bill of lading" cannot be held to operate as a limitation. The inference to be drawn from the statement is that no cotton whatever was delivered for transportation to the agent at Sherman station. The question arises, then, whether the agent of a railroad company at one of its stations can bind the company by the execution of a bill of lading for goods not actually placed in his possession, and its delivery to a person fraudulently pretending in collusion with such agent that he had shipped such goods, in favor of a party without notice, with whom, in furtherance of the fraud, the pretended shipper negotiates a draft, with the false bill of lading attached. Bills of exchange and promissory notes are representatives of money, circulating in the commercial world as such, and it is essential, to enable them to perform their peculiar functions, that he who purchases them should not be bound to look beyond the instrument, and that his right to enforce them should not be defeated by anything short of bad faith on his part. But bills of lading answer a different purpose and perform different functions. They are regarded as so much cotton, grain, iron or other articles of merchandise, in that they are symbols of ownership of the goods they cover. And as no sale of goods lost or stolen, though to a bona fide purchaser for value, can divest the ownership of the person who lost them or from whom they were stolen, so the sale of the symbol or mere representative of the goods can have no such effect, although it sometimes happens that the true owner, by negligence,

law to put it into the power of another to destroy his property without his consent, or to compel him to become a party to a contract, which has been framed to the hurt of [illegible] Shaw v. Railroad Co., 101 U. S. 557, 563; Pollard v. Vinton, 105 U. S. 7; Mowry v. Whitney, 14 Wall. 620, 651, 652. It is true that while not negotiable or commercial paper in the sense of being adapted to commonly used as security for loans and advances, [illegible] it is used as evidence of ownership, special or general, of the property mentioned in them, and of the right to receive such property at the place of delivery.

Such being the character of a bill of lading, can a recovery be had against a common carrier for goods never actually in its possession for transportation, because one of its agents, having authority to sign bills of lading, in collusion with another person, signed one to the shipper in the absence of any goods at all?

It has been frequently held by this court that the master of a vessel has no authority to sign a bill of lading for goods not actually put on board the vessel, and if he does so, his act does not bind the owner of the ship even in favor of an innocent purchaser. The Freeman v. Buckingham, 18 How. 182, 191; The Lady Franklin, 8 Wall. 325; Pollard v. Vinton, 105 U. S. 7. And this agrees with the rule laid down by the English courts. Lickbarrow v. Mason, 2 T. R. 63; Grant v. Norway, 10 C. B. 665; Cox v. Price, 18 Q. B. D. 147. "The receipt of the goods," said Mr. Justice Miller, in Pollard v. Vinton, supra, "lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver." [illegible] doctrine is applicable to transportation contracts made in that way by railroad companies and other carriers by land, as well as carriers by water. [illegible] by Mr. Justice Matthews in Iron Mountain Railway v. Wood, 112 U. S. 178, 85, he stating also: "If [illegible] agent has received [illegible] of the plaintiff in error any money at all, or any good [illegible] has taken called for by the bills of lading, it is clear that the plaintiff in error would not be liable for the defendant." That is very much [illegible] in the case of The Schooner Freeman v. Buckingham, 18 How. 182, and Pollard v. Vinton, 105 U. S. 7.

It is a familiar principle of law that where one of two innocent persons must suffer by the fraud of another, the loss should fall upon him who enabled such third person to commit the fraud. [illegible] that the railroad company did not intend to do [illegible] [illegible] as were evident. Language to impose upon [illegible] & Co. The agreement not only did not authorize [illegible] [illegible] bills of lading, but it did not assume authority [illegible] [illegible] documents except upon the delivery of the merchandise. There was on the company's part [illegible] the transaction, for there [illegible] upon which the carrier could act. Railroad companies are not issuers of bills of exchange nor of bills of lading; they are carriers only.

has so put it into the power of another to occupy his position ostensibly, as to estop him from asserting his right as against a purchaser, who has been misled to his hurt by reason of such negligence. Shaw v. Railroad Co., 101 U. S. 557, 563; Pollard v. Vinton, 105 U. S. 7, 8; Gurney v. Behrend, 3 El. & Bl. 622, 633, 634. It is true that while not negotiable as commercial paper is, bills of lading are commonly used as security for loans and advances; but it is only as evidence of ownership, special or general, of the property mentioned in them, and of the right to receive such property at the place of delivery.

Such being the character of a bill of lading, can a recovery be had against a common carrier for goods never actually in its possession for transportation, because one of its agents, having authority to sign bills of lading, by collusion with another person issues the document in the absence of any goods at all?

It has been frequently held by this court that the master of a vessel has no authority to sign a bill of lading for goods not actually put on board the vessel, and, if he does so, his act does not bind the owner of the ship even in favor of an innocent purchaser. The Freeman v. Buckingham, 18 How. 182, 191; The Lady Franklin, 8 Wall. 325; Pollard v. Vinton, 105 U. S. 7. And this agrees with the rule laid down by the English courts. Lickbarrow v. Mason, 2 T. R. 77; Grant v. Norway, 10 C. B. 665; Cox v. Bruce, 18 Q. B. D. 147. "The receipt of the goods," said Mr. Justice Miller, in Pollard v. Vinton, *supra,* "lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver." "And the doctrine is applicable to transportation contracts made in that form by railway companies and other carriers by land, as well as carriers by sea," as was said by Mr. Justice Matthews in Iron Mountain Railway v. Knight, 122 U. S. 79, 87, he adding also: "If Potter (the agent) had never delivered to the plaintiff in error any cotton at all to make good the 525 bales called for by the bills of lading, it is clear that the plaintiff in error would not be liable for the deficiency. This is well established by the cases of The Schooner Freeman v. Buckingham, 18 How. 182, and Pollard v. Vinton, 105 U. S. 7."

It is a familiar principle of law that where one of two innocent parties must suffer by the fraud of another, the loss should fall upon him who enabled such third person to commit the fraud; but nothing that the railroad company did or omitted to do can be properly said to have enabled Lahnstein to impose upon Friedlander & Co. The company not only did not authorize Easton to sign fictitious bills of lading, but it did not assume authority itself to issue such documents except upon the delivery of the merchandise. Easton was not the company's agent in the transaction, for there was nothing upon which the agency could act. Railroad companies are not dealers in bills of exchange, nor in bills of lading; they are carriers only,

and held to rigid responsibility as such. Easton, disregarding the object for which he was employed, and not intending by his act to execute it, but wholly for a purpose of his own and of Lahnstein, became *particeps criminis* with the latter in the commission of the fraud upon Friedlander & Co., and it would be going too far to hold the company, under such circumstances, estopped from denying that it had clothed this agent with apparent authority to do an act so utterly outside the scope of his employment and of its own business. The defendant cannot be held on contract as a common carrier, in the absence of goods, shipment and shipper; nor is the action maintainable on the ground of tort. "The general rule," said Willes, J., in Barwick v. English Joint Stock Bank, L. R. 2 Ex. 259, 265, "is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." See also Limpus v. London General Omnibus Co., 1 H. & C. 526. The fraud was in respect to a matter within the scope of Easton's employment or outside of it. It was not within it, for bills of lading could only be issued for merchandise delivered; and being without it, the company, which derived and could derive no benefit from the unauthorized and fraudulent act, cannot be made responsible. British Mutual Banking Co. v. Charnwood Forest Railway Co., 18 Q. B. D. 714.

The law can punish roguery, but cannot always protect a purchaser from loss, and so fraud perpetrated through the device of a false bill of lading may work injury to an innocent party, which cannot be redressed by a change of victim.

Under the Texas statutes the trip or voyage commences from the time of the signing of the bill of lading issued upon the delivery of the goods, and thereunder the carrier cannot avoid his liability as such, even though the goods are not actually on their passage at the time of a loss, but these provisions do not affect the result here.

We cannot distinguish the case in hand from those heretofore decided by this court, and in consonance with the conclusions therein announced this judgment must be

Affirmed.[1]

[1] See collection of cases in accord with the principal case in Nat. Bank of Commerce v. Chicago, etc., R. Co., 44 Minn. 224, 232 and 233. On page 233, Mitchell, J., says: "The reasoning by which this doctrine is usually supported is that a bill of lading is not negotiable in the sense in which a bill of exchange or promissory note is negotiable, where the purchaser need not look beyond the instrument itself; that so far as it is a receipt for the goods it is susceptible of explanation or contradiction, the same as any other receipt; that the whole question is one of the law of agency; that it is not within the scope of the authority of the shipping agent of a carrier to issue bills of lading where no property is in fact received for transportation; that the extent of his authority, either real or apparent, is to issue bills of lading for freight actually received; that his real and apparent authority—*i. e.*, the power with which his

BANK OF BATAVIA v. NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.

1887. Court of Appeals of New York. 106 N. Y. 195.

Appeal from judgment of the General Term of the Supreme Court in the fifth judicial department in favor of plaintiff, entered upon an order made October 31, 1884, which denied a motion for a new trial and ordered judgment on a verdict directed by the court. (Reported below 33 Hun 589.)

This action was brought to recover damages alleged to have been sustained by plaintiff in consequence of the wrongful issue by defendant, through its local freight agent at Batavia, of two bills of lading. The recital in one was as follows: "Received from F. C. Williams the following articles (contents unknown) in apparent good order, viz., thirty-five barrels of beans." The recital in the other was the same, save that the articles described were "thirty barrels of beans." The consignee named was "I. T. Comstock, New York."

The material facts are stated in the opinion.

Finch, J.—It is a settled doctrine of the law of agency in this state that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice. (North River Bank v. Aymar, 3 Hill 362; Griswold v. Haven, 25 N. Y. 595, 601; N. Y. & N. H. R. R. Co. v. Schuyler, 34 *id.* 30; Armour v. M. C. R. R. Co., 65 *id.* 111.) A discussion of that doctrine is no longer needed or permissible in this court, since it has survived an inquiry of the most exhaustive character, and an assault remarkable for its persistence and vigor. If there be any exception to the rule within our jurisdiction it arises in the case of municipal corporations whose structure and functions are sometimes claimed to justify a more restricted liability. The application of this rule to the case at bar has

principal has clothed him in the character in which he is held out to the world —is the same, viz.: to give bills of lading for goods received for transportation; and that this limitation upon his authority is known to the commercial world, and therefore any person purchasing a bill of lading issued by the agent of a carrier acts at his own risk as respects the existence of the fact (the receipt of the goods) upon which alone the agent has authority to issue the bill, the rule being that, if the authority of an agent is known to be open for exercise only in a certain event, or upon the happening of a certain contingency, or the performance of a certain condition, the occurrence of the event, or the happening of the contingency, or the performance of the condition, must be ascertained by him who would avail himself of the results ensuing from the exercise of the authority."

determined it in favor of the plaintiffs and we approve of that conclusion.

One Weiss was the local freight agent of the defendant corporation at Batavia, whose duty and authority it was to receive and forward freight over the defendant's road, giving a bill of lading therefor specifying the terms of the shipment, but having no right to issue such bills except upon the actual receipt of the property for transportation. He issued bills of lading for sixty-five barrels of beans to one Williams, describing them as received to be forwarded to one Comstock, as consignee, but adding with reference to the packages that their contents were unknown. Williams drew a draft on the consignee, and procured the money upon it of the plaintiff by transferring the bills of lading to secure its ultimate payment. It turned out that no barrels of beans were shipped by Williams, or delivered to the defendant, and the bills of lading were the product of a conspiracy between him and Weiss to defraud the plaintiff or such others as could be induced to advance their money upon the faith of the false bills.

It is proper to consider only that part of the learned and very able argument of the appellant's counsel which questions the application of the doctrine above stated to the facts presented. So much of it as rests upon the ground that no privity existed between the defendant and the bank may be dismissed with the observation that no privity is needed to make the estoppel available other than that which flows from the wrongful act and the consequent injury. (N. Y. & N. H. R. R. C. v. Schuyler, *supra.*)

While bills of lading are not negotiable in the sense applicable to commercial paper, they are very commonly transferred as security for loans and discounts, and carry with them the ownership, either general or special, of the property which they describe. It is the natural and necessary expectation of the carrier issuing them that they will pass freely from one to another and advances be made upon their faith, and the carrier has no right to believe, and never does believe, that their office and effect is limited to the person to whom they are first and directly issued. On the contrary, he is bound by law to recognize the validity of transfers and to deliver the property only upon the production and cancellation of the bill of lading.

If he desires to limit his responsibility to a delivery to the named consignee alone, he must stamp his bills as "non-negotiable:" and where he does not do that he must be understood to intend a possible transfer of the bills and to affect the action of such transferees. In such a case the facts go far beyond the instances cited, in which an estoppel has been denied because the representations were not made to the party injured. (Mayenborg v. Haynes, 50 N. Y. 675; Maguire v. Selden, 103 N. Y. 642.) Those were cases in which the representations made were not intended and could not be ex-

determined it in favor of the plaintiff, and we approve of that conclusion.

[illegible] the [illegible] consent of the defendant [illegible] to transfer [illegible] and receive it was a reserve and forward freight [illegible] consideration [illegible] good, proves a sufficient holding there[illegible] receiving [illegible] the [illegible] the right to have such [illegible] upon the usual receipt of the company for transportation. [illegible] of having for examination barrels of flour [illegible] them as proposed to be forwarded to New Orleans [illegible], but adding [illegible] reference to the package [illegible] unknown. Williams drew a draft on the [illegible] the delivery upon it of the plaintiff by transferring [illegible] failing to secure the ultimate payment. It [illegible] bills of lading were shipped by Williams, or delivered [illegible], and the bills of lading were the product of a [illegible] Weiss to defraud the plaintiff or such [illegible] induced to advance their money upon the faith of [illegible]

[illegible] that part of the learned and very able [illegible] which controverts the application [illegible] to the facts presented. So much of it [illegible] no privity existed between the defend[illegible] with the observation that no [illegible] available other than that which [illegible] and the consequent injury. (Ch. Y. & N. H. R. R. [illegible] 5 Barb.)

[illegible] bills of lading [illegible] negotiable in the sense applicable to [illegible] commonly transferred as security for loans and [illegible] with them the ownership, either general or [illegible] property which they describe. It is the [illegible] of the carrier issuing them that they will [illegible] another and advances be made upon their [illegible] right to believe, and never does believe, that [illegible] is limited to the person to whom they are [illegible] On the contrary, he is bound to [illegible] and to deliver the property [illegible] of the bill of lading.

[illegible] responsibility to a delivery to the named [illegible] "non-negotiable" and where they are "non-negotiable" and where they are understood to intend a possible [illegible] the person or such transferee, to [illegible] the contract cited, in which an [illegible] representations were not made to the [illegible] v. Haynes, 30 N. Y. 605; Mahoney v. [illegible] Those very cases in which the [illegible] and could not be ex-

pected to influence the persons who relied upon them, and their knowledge of them was described as purely accidental and not anticipated. Here they were of a totally different character. The bills were made for the precise purpose, so far as the agent and Williams were concerned, of deceiving the bank by their representations, and every bill issued not stamped was issued with the expectation of the principal that it would be transferred and used in the ordinary channels of business, and be relied upon as evidence of ownership or security for advances. Those thus trusting to it and affected by it, are not accidentally injured, but have done what they, who issued the bill had every reason to expect. Considerations of this character provide the basis of an equitable estoppel, without reference to negotiability or directness of representation.

It is obvious, also, upon the case as presented, that the fact or condition essential to the authority of the agent to issue the bills of lading was one unknown to the bank and peculiarly within the knowledge of the agent and his principal. If the rule compelled the transferee to incur the peril of the existence or absence of the essential fact, it would practically end the large volume of businesss founded upon transfers of bills of lading. Of whom shall the lender inquire, and how ascertain the fact? Naturally he would go to the freight agent, who had already falsely declared in writing that the property had been received. Is he any more authorized to make the verbal representation than the written one? Must the lender get permission to go through the freight house or examine the books? If the property is grain, it may not be easy to identify, and the books, if disclosed, are the work of the same freight agent. It seems very clear that the vital fact of the shipment is one peculiarly within the knowledge of the carrier and his agent, and quite certain to be unknown to the transferee of the bill of lading, except as he relies upon the representation of the freight agent.

The recital in the bills that the contents of the packages were unknown would have left the defendant free from responsibility for a variance in the actual contents from those described in the bill, but is no defense where nothing is shipped and the bill is wholly false. The carrier cannot defend one wrong by presuming that if it had not occurred another might have taken its place. The presumption is the other way; that if an actual shipment had been made the property really delivered would have corresponded with the description in the bills.

The facts of the case bring it, therefore, within the rule of estoppel as it is established in this court and justify the decision made.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.[1]

[1] *Accord:* Sioux City, etc., R. Co. v. First Nat. Bank, 10 Neb. 556; Brooke

(b) PERSONAL INJURY.

GREGORY v. PIPER.

1829. COURT OF KING'S BENCH. 9 B. & C. 591.

TRESPASS for casting, throwing, placing, and depositing divers large quantities of earth, stones, bricks and rubbish against and upon the walls and gates and posts of the plaintiff. Plea, not guilty. At the trial before Alexander, C. B., at the summer assizes for the county of Cambridge, 1828, it appeared that the plaintiff occupied a public house called the Rising Sun, in Newmarket, with a stable-yard belonging to it, where he put up the horses of his guests. The way to the stable was by the back gate from the High street, through a yard called the Old King's Yard. A wall belonging to the plaintiff separated his stable-yard from the Old King's Yard. The defendant having purchased the property surrounding the Old King's Yard, disputed the plaintiff's right to pass along the same to his stable, and employed one Stubbings, a laborer, to lay down a quantity of rubbish, consisting of bricks, mortar, stones, and dirt, near the plaintiff's stable-yard, in order to obstruct the way; and Stubbings, on the 26th of April, and several following days, laid down rubbish accordingly, part of which rolled against plaintiff's wall and gates. It lay about two feet high against the plaintiff's wall for five or six yards in length. Stubbings being called as a witness on the part of the plaintiff, stated that he was employed by the defendant to lay the rubbish in the yard; that the defendant had given him orders not to let any of the rubbish touch the plaintiff's wall; that he executed those orders as nearly as he could, and accordingly laid the rubbish at first at the distance of a yard and a half from the wall; and that the rubbish, being of a loose kind, as it became dry naturally shingled down toward and ran against the wall. He added that some of it would of course run against the wall.

It further appeared that on the third of May, when an application was made by the plaintiff to the defendant to remove the rubbish, the latter said he was determined not to remove it. Upon this evidence it was objected by the defendant that trespass was not maintainable, inasmuch as the defendant had given express orders to the servant not to let the rubbish touch the plaintiff's wall; that, there-

v. New York, etc., R. R. Co., 108 Pa. St. 529. Wichita Sav. Bank v. Atchison, etc., R. R. Co., 20 Kan. 519. On page 523 of the last named case, Horton, C. J., says: "Instruments of this kind (bills of lading and warehouse receipts) are *sui generis*. From long use and trade, they have come to have among commercial men a well-understood meaning, and the endorsement or assignment of them as absolutely transfers the general property of the goods and chattels therein named as would a bill of sale."

See Fifth Ave. Bank v. Forty-second Street, etc., R. R. Co., 137 N. Y. 231.

VIPER.

1832 (Common Pleas Division. 3 B. & C. 50.

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fore, the touching of the wall was occasioned by the negligence of the defendant's servant, and that case, not trespass, was therefore maintainable.

The Lord Chief Baron directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a non-suit. A rule *nisi* having been obtained for that purpose, Storks, Serjt., and Kelly, were to have shown cause against the rule, but the court called upon Denman and Gunning to support the rule. A master is liable in an action on the case only for the negligent conduct of his servant, and not at all for a wilful unauthorized trespass committed by his servant, Morley v. Gaisford, 2 H. Bl. 442; M'Manus v. Crickett, 1 East 106. And if a servant being ordered to do a lawful act exceed his authority, and thereby commit an injury, the master is not liable. Here the master gave express directions to the servant to lay the rubbish so that it should not touch the wall of the plaintiff. [Parke, J.—The servant could not execute the orders of the master without some of the rubbish touching the wall; that was the necessary consequence of the act ordered to be done, and the person who gave the order must be taken to have contemplated the necessary consequence of his own act. The rolling of the rubbish against the wall was therefore as much the act of the defendant as if he had ordered it to be done.] The master is liable only for the inevitable consequences of the act. Here the servant by extraordinary care might have prevented the rubbish touching the plaintiff's wall. The Society of the Inner Temple have authorized the putting up of boards to obstruct windows opening upon their premises, but so as not to touch the wall of the premises in which the windows are. If a workman had wilfully knocked out a brick, that society would not have been liable. If the workman had done so through negligence they might have been liable in case, but not in trespass.

Bayley, J.—The only question is, Whether the trespass was the act of the master. The master desired the servant to lay down the rubbish so as not to let it touch or lean against the wall of the plaintiff. But if in the execution of the order it was the necessary or natural consequence of the act ordered to be done that the rubbish should go against the wall, the master is answerable in trespass. The evidence shows that that was the natural consequence. The rule must, therefore, be discharged.

Littledale, J.—Where a servant does work by order of his master, and the latter imposes a restriction in the course of executing his order which it is difficult for the servant to comply with, and the servant, in execution of the order, breaks through the restriction, the master is liable in trespass. Suppose the case of two persons possessed of contiguous unenclosed land, and that the one of them desired his servant to drive his cattle, but not to let them go upon the land of his neighbor, and that the cattle went upon the land of

the neighbor, the master would be answerable in trespass, because he has only a right to expect from his servant ordinary, not extraordinary care. If the servant, therefore, in carrying into execution the orders of his master uses ordinary care, and an injury is done to another, the master is liable in trespass. If the injury arise from the want of ordinary care in the servant, the master will only be liable in case. Here the servant used ordinary care in the course of executing the master's order, and notwithstanding that, the rubbish ran against the wall.

PARKE, J.—I think that the defendant is liable in this form of action. If a single stone had been put against the wall it would have been sufficient. Independently of Stubbings's evidence there was sufficient evidence to satisfy the jury that the rubbish was placed there by the defendant, for he expressed his determination not to remove it. It does not rest there. Stubbings says he was desired not to let the rubbish touch the wall. But it appeared to be of a loose kind, and it was therefore probable that some of it naturally might run against the wall. Stubbings said that some of it of course would go against the wall. Now the defendant must be taken to have contemplated all the probable consequences of the act which he had ordered to be done, and one of these probable consequences was, that the rubbish would touch the plaintiff's wall. If that was so, then the laying the rubbish against the wall was as much the defendant's act as if it had been done by his express command. The defendant, therefore, was the person who caused the act to be done, and for the necessary or natural consequence of his own act he is responsible as a trespasser.

Rule discharged.[1]

SEARLE v. PARKE ET AL.

1895. SUPREME COURT OF NEW HAMPSHIRE. 68 N. H. 311.

ACTION by George F. Searle against A. J. Parke and another.

Trespass, *de bonis,* with a count in trover, for taking and carrying away and for the conversion of a diamond ring. Facts found by the court. The defendants were engaged in decorating the Statesman Building, and employed B and S, two irresponsible strangers, to assist them. June 20, 1894, it became convenient in the prosecution

[1] "In the consideration of the question, as to the liability of the master for the injuries caused by his servant, the cases in which the wrong has been done by the command of the master must be distinguished from those in which there is no command. Where a master commands a thing to be done, and an injury results from the want of care in the servant whilst performing the order, the master is liable in trespass." Scott, J., in Douglass v. Stephens, 18 Mo. 362, 366.

[illegible] the neighbor, the master would be responsible to strangers, because he has only a right to expect [illegible] ordinary, not extraordinary care. If the servant, [illegible] carrying into execution the orders of his master [illegible] and an injury is done to another, the master is [illegible] If the injury arise from the want of ordinary [illegible] no master will only be liable to case. Does the [illegible] care in the course of executing the orders [illegible] standing that the rubbish ran against the wall.

Proof [illegible] defendant is liable in this form of action. If a [illegible] against the wall it would have been [illegible] Stubbings's evidence there was sufficient [illegible] that the rubbish was placed there [illegible] expressed his determination not to remove [illegible] Stubbings said he was desired not [illegible] It appeared to be of a loose [illegible] possible that some of it naturally might [illegible] and that some of it of course would [illegible] defendant could be taken to have contemplated [illegible] of the act which he had ordered [illegible] these probable consequences was, that [illegible] plaintiff's wall. If that was so, then the [illegible] the wall was as much the defendant's act [illegible] as if [illegible] had removed the rubbish himself. The defendant, therefore, [illegible] ordered the act to be done, and for the [illegible] of his own acts he is responsible as a [illegible]

Rule [illegible]

[illegible] v. MARINE et al.

1893. [illegible] Hennepin. 108 N. W. 311.

Action by [illegible] against A. J. Perkins and another. Trespass, [illegible] to recover for taking and carrying away and [illegible] a diamond ring. Facts found by the court. [illegible] defendants were engaged in decorating the Statesman Building, and employed [illegible] to assist them. [illegible] strangers to [illegible] Upon the [illegible] conversion in the prosecution

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[illegible] the [illegible] of the master to the [illegible] caused by [illegible] to which the wrong was done by the [illegible] of the master, and [illegible] from those to whom there is no [illegible] [illegible] command, a thing to be done, and an injury resulting from the [illegible] the [illegible] of first performing the order, the master [illegible] [illegible] 1, 10 Ohio St. Stephens, 10 Mo. 362, 366.

of the work to enter, in his absence, the plaintiff's room in the building, to the exclusive possession of which he was entitled, and the door of which was locked. B, by direction of the defendants, entered the room through the window, and admitted S by the door. They remained there an hour or so, during which one or both of them stole the ring. Neither of the defendants entered or went near the room. The plaintiff moved for leave to amend by filing counts in trespass *quare clausum* and in case.

CARPENTER, J.—On the facts stated, the defendants are not liable for the larceny of the ring in any form of action. To entitle the plaintiff to recover in trespass *de bonis* or trover, it must be shown that the defendants, personally or by their servants, acting within the scope of their employment, participated in the taking and conversion, or that it was taken for their benefit, and that they ratified the taking. 2 Greenl. Ev., § 631; Wilson v. Tumman, 6 Man. & G. 236, 242, 243; Lewis v. Read, 13 Mees. & W. 834. It is not claimed that the defendants took part in or ratified the trespass, and there is as little ground to claim that they are liable in their character as masters. Theft was not the business for which B and S were engaged, nor was it within the scope of their employment. The mere fact that the wrongdoers were their servants is not sufficient to make the defendants answerable for the wrong. Wilson v. Peverly, 2 N. H. 548; Arthur v. Balch, 23 N. H. 157; Andrews v. Green, 62 N. H. 436. The plaintiffs could not recover in case against the defendants for negligently employing thieves as servants, because negligence is not found. In trespass *quare clausum* the defendants would be liable in nominal damages, at least, for the breaking and entering, which they directed. They would also be responsible for any damage directly caused by the act of breaking and entering, and for any consequential injury that naturally and reasonably could be expected to result therefrom. For consequences neither natural nor probable, they would not be answerable. Gilman v. Noyes, 57 N. H. 627; Pol. Torts, 31-37; Cooley, Torts, 68-77. The larceny was not the immediate or direct result of the unlawful act which the defendants directed. Whether it was the natural or probable consequence of the act—a consequence that the defendants reasonably ought to have anticipated—is a question of fact. Gilman v. Noyes, 57 N. H. 627. That it was such a consequence is not, and on the evidence reported could not properly be found.

Judgment for the defendants.

Blodgett, J., did not sit. The others concurred.[1]

[1] "If A command or request B to take the goods of C, and B do it, this action lies as well against A as against B." Bac. Abr., Vol. 4, title Trespass, G. 1.

JOEL v. MORISON.

1834. *Nisi Prius.* 6 C. & P. 501.

The declaration stated, that, on the 18th of April, 1833, the plaintiff was proceeding on foot across a certain public and common highway, and that the defendant was possessed of a cart and horse, which were under the care, government, and direction of a servant of his, who was driving the same along the said highway, and that the defendant by his said servant so carelessly, negligently and improperly drove, governed, and directed the said horse and cart, that, by the carelessness, negligence, and improper conduct of the defendant by his servant, the cart and horse were driven against the plaintiff and struck him, whereby he was thrown down and the bone of one of his legs was fractured, and he was ill in consequence, and prevented from transacting his business, and obliged to incur a great expense in and about the setting the said bone, etc., and a further great expense in retaining and employing divers persons to superintend and look after his business for six calendar months. Plea—not guilty.

From the evidence on the part of the plaintiff it appeared that he was in Bishopgate street, when he was knocked down by a cart and horse coming in the direction from Shoreditch, which were sworn to have been driven at the time by a person who was the servant of the defendant, another of his servants being in the cart with him. The injury was a fracture of the fibula.

On the part of the defendant witnesses were called, who swore that his cart was for weeks before and after the time sworn to by the plaintiff's witnesses only in the habit of being driven between Burton Crescent Mews and Finchley, and did not go into the city at all.

Thesiger, for the plaintiff, in reply, suggested that either the defendant's servants might in coming from Finchley have gone out of their way for their own purposes, or might have taken the cart at a time when it was not wanted for the purpose of business, and have gone to pay a visit to some friends. He was observing that, under these circumstances, the defendant was liable for the acts of his servants.

Parke, B.—He is not liable if, as you suggest, these young men took the cart without leave; he is liable if they were going *extra viam* in going from Burton Crescent Mews to Finchley; but if they chose to go of their own accord to see a friend, when they were not on their master's business, he is not liable.

His Lordship afterwards, in summing up, said: This is an action to recover damages for an injury sustained by the plaintiff, in consequence of the negligence of the defendant's servant. There is no doubt that the plaintiff has suffered the injury, and there is no doubt that the driver of the cart was guilty of negligence, and there is no

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[illegible] 5 T. R. 507

[illegible] declaration stated [illegible] 1793, the plaintiff was proceeding [illegible] upon a certain public and common highway, and that the defendant was possessed of a cart and horse which were under the care [illegible] of a servant of his, who was driving the same [illegible] and highway, and that the defendant by his [illegible] so negligently, improperly and unskilfully drove [illegible] cart, that, by the [illegible] and wrongful conduct of the defendant by his servant, the said horse was driven against the plaintiff and [illegible] down, and the [illegible] or one of the legs [illegible] of the plaintiff to [illegible] and prevented from [illegible] and obliged to incur a great expense in [illegible] and was [illegible] and a further great expense [illegible] and supporting divers persons to superintend and [illegible] the plaintiff's business during that time. The defendant pleaded [illegible] the plaintiff complained that he was lawfully driving in a cart and [illegible] on the highway from Shoreditch, which were crowded [illegible] and that the defendant, by his servant who was driving [illegible] the servants being in the care and direction [illegible] the horse.

[illegible] were called, who proved that the cart was [illegible] before and after the time when the [illegible] and in the habit of being driven between [illegible] Hackney; and that [illegible] to the city at all.

Thereupon [illegible] suggested that either the defendant's servant must [illegible] Shoreditch have gone out of their way [illegible] or might have taken the cart [illegible] for the purpose of business, and have gone to see a [illegible] friends. He was observing that, under these circumstances, [illegible] was liable on the axis of [illegible]

[illegible] He is not [illegible] very suggest that some men [illegible] when a [illegible] it they were going [illegible] to Dalston, but if they could [illegible] their master's business [illegible] friends, when they were not on their master's business [illegible]

The Lord [illegible] to [illegible] and [illegible] that it is [illegible] to recover damages [illegible] sustained by the plaintiff, in consequence of the negligence [illegible] servant. There is no doubt, on the plaintiff's [illegible] and there is no doubt that the driver of the cart was guilty of negligence, and there is no

doubt also that the master, if that person was driving the cart on his master's business is responsible. If the servants, being on their master's business took a detour to call upon a friend, the master will be responsible. If you think the servants lent the cart to a person who was driving without the defendant's knowledge, he will not be responsible. Or, if you think that the young man who was driving took the cart surreptitiously, and was not at the time employed on his master's business, the defendant will not be liable. The master is only liable when the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable. As to the damages, the master is not guilty of any offense, he is only responsible in law, therefore the amount should be reasonable.

Verdict for the plaintiff—damages, 30*l.*[1]

CROFT v. ALISON.

1821. Court of King's Bench. 4 B. & Ald. 590.

The declaration stated, that the plaintiffs were the owners and proprietors of a certain chariot, then lawfully being and standing in a certain public highway, and that the defendant was possessed of a certain coach and horses, under the care and government of a servant, who was then driving the same along the highway, and that the defendant, by his said servant, so carelessly and improperly

[1] See article by John H. Wigmore, "Responsibility for Tortious Acts: Its History." Part II, 7 Harv. Law Rev. 383.

"In no case does this phrase (*respondeat superior*) point to an absolute liability of the superior for acts done by the inferior or even for those done in the course of his employment. In all cases it points to a merely subsidiary liability of the superior, which can only be enforced against him when it is proved or patent that the inferior cannot pay for his own misdeed. This indicates, as we believe, what has first and last been one of the main causes of 'employer's liability.'" 2 Pollock and Maitland, Hist. Eng. Law 531.

"The law has said that whenever an injury has been occasioned by the negligent conduct of a person in the service of another, the master is answerable for it; and this is for the purpose of inducing those who employ others to take care that they employ proper persons." Erskine, J., to jury in Sleath v. Wilson, 9 C. & P. 607, 610.

"This rule of liability is not based upon any presumed authority in the agent to do the acts, but upon the ground of public policy, and that it is more reasonable, where one of two innocent parties must suffer from the wrongful act of a third person, that the principal, who has placed the agent in the position of trust and confidence, should suffer rather than a stranger." Mason, J., in Lee v. Village of Sandy Hill, 40 N. Y. 442, 448.

drove, governed, and directed his said coach and horses that, by the carelessness, negligence, and improper conduct of the defendant, by his servant, one of the fore-wheels of the coach struck, and damaged the said chariot. Plea, general issue. At the trial, it appeared that the plaintiffs, who were livery-stable keepers, had hired the chariot for the day of Messrs. Lambert & Bryant, who were coachmakers. The plaintiff furnished the horses, and appointed the coachman, and then let it out to an individual for the day. It was stated in evidence, that the cause of the accident arose from the defendant's coachman striking the plaintiff's horses with his whip, in consequence of which they moved forward, and the chariot was overturned. At the time when the horses were struck, the two carriages were entangled. The lord chief justice, at the trial, left it to the jury to determine, whether the carriages had become entangled from the moving of the horses of the plaintiff's which, previously to the accident, were standing still and without a driver, and he directed them to find for the defendant, in case they thought so, and that the whipping by the defendant's coachman was for the purpose of extricating himself from that situation. But he directed them to find for the plaintiffs, in case they were of opinion, that the entangling arose originally from the fault of the defendant's coachman. The jury found a verdict for the plaintiffs. And now

Scarlett moved for a new trial. First, the plaintiffs cannot properly be called the owners and proprietors of the chariot, having only hired it of the real proprietors for one day; and if any but the real proprietors can be so called, the individual actually using the carriage at the time might be much more properly called so than the present plaintiffs. Secondly, the injury arose from the act of the defendant's coachman, in whipping the plaintiff's horses; now that was a wanton act on his part, for which he himself, and not his master, would be liable; and the declaration which charges, that, by the carelessness, negligence, and improper conduct of the defendant's servant, the accident happened, is not supported by the proof of a wanton act.

Per Curiam.—As to the first point, it has never been supposed that a mere passenger in a carriage can be considered as the owner and proprietor, so as to be entitled to bring this action. The plaintiffs, however, are something more, for they have not only hired the chariot for the day, but have appointed the coachman and furnished the horses. They may, therefore, be considered, for the purposes of this declaration, as the owners and proprietors of the chariot. As to the second point, the distinction is this; If a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person, and produce the accident, the master will not be liable. But if, in order to perform his master's orders he strikes out injudiciously, and in order to ex-

tricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment. The case, therefore, has been properly left to the jury.

Rule refused.[1]

McDOWELL v. THE HOMER RAMSDELL TRANSPORTATION COMPANY.

1894. SUPREME COURT OF NEW YORK. 78 Hun 228.

APPEAL by the plaintiff, Bertram A. McDowell, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Dutchess on the 20th day of June, 1893, upon the dismissal of the complaint directed by the court after a trial at the Dutchess circuit before the court and a jury, with notice of an intention to bring up for review on such appeal the order granting a non-suit.

DYKMAN, J.—If the plaintiff prevails in this action it must be upon the successful invocation of the principle of respondeat superior, because the individual who perpetrated the cruel wrong upon him is not sued, the claim of the plaintiff being that he was the servant of the defendant, who was, therefore, responsible for his wrongful act. The rule of law that what a man does by another he does himself is so well established that it has passed into a legal maxim. And upon that rule is built up another legal principle equally well established under the name of respondeat superior, which belongs to the relation of principal and agent, master and servant, superior and subordinate, and is co-extensive with those relations.

The rule itself is free from obscurity and easily understood, but its applicability to a given case is oftentimes very uncertain, arising from the difficulty of determining whose servant the person is who perpetrated the wrong which caused the injury.

The basis of the rule is the power of the superior to prevent the injury by controlling the subordinate, and where such power does not exist the rule has no application. It will be of paramount importance, therefore, to ascertain whether the individual who injured the plaintiff was the servant of the defendant at the time of the commission of the act, and, therefore, a recitation of the facts will not be inappropriate.

On the 3d day of August, 1892, the defendant was the owner of the steamboat James T. Brett, which was in commission and supplied

[1] A good case holding that one who lends a horse is not liable for injuries resulting to a third party from the use of the horse is Bard v. Yohn, 26 Pa. St. 482.

with the complement of officers and men employed by the defendant for the successful navigation of the vessel. On that day the boat was chartered to Mink and Burnett for an excursion from Highland, in Ulster county, to Coney island and back. The charterers advertised the excursion in their own name, and assumed the control of the boat and crew, and received the proceeds of the adventure. The excursion was made without accident until the return of the boat to the dock at Fishkill Landing in the evening. When the boat was leaving the dock the plaintiff requested and received permission from Burnett to go on board the boat. At that time the gang plank had been hauled in, the rail put up and the paddle wheels started. The plaintiff jumped upon the guard of the boat outside the rail and was shoved off into the water by one of the crew. The boat was stopped and the plaintiff rescued, but he was placed in imminent peril of his life.

At the close of the trial at the circuit the plaintiff was non-suited, and he has appealed from the judgment.

In the examination of the case we will assume that the plaintiff had the right to go upon the boat as he undertook to do and that his expulsion was wrongful. While it might be a presumption of law arising from the ownership of the boat that it was in use for the benefit of its owners, that presumption is overcome in this case by the proof that the ownership was separate from the possession, which was not in subordination to the title but to the charter-party. An excursion may be concluded without danger or harm to any one. If it could not then the defendant might be liable because it chartered the boat for that very service, and could not escape liability by interposing the contract to do the thing that caused the injury.

It is to be observed, also, that the injury to the plaintiff did not result from any defect in the boat or its machinery or appliances, nor from any fault in the navigation or management of the boat, but from the wrongful conduct of one of the crew.

The owner surrendered all control of the boat and all her employes, and had no immediate interest in her earnings during the existence of the charter party. There was, therefore, an actual demise of the vessel which stripped the owner not only of the possession of the boat, but also of all authority and control of her. When the charterers hired the boat and crew that was an adoption and selection of the men which constituted them their servants, and the men were under their full control. They could remove any of the deck hands for disobedience or misconduct, and that power brought them within the rule laid down in Quarman v. Burnett, hereafter noticed. These facts appear to be sufficient to bring the case within the decision of the court of appeals in the case of Scarff v. Metcalf (107 N. Y. 211). They create the relation of master and servant between the crew and charterers. As there cannot be two superiors at

the same time, the defendant is relieved from the position if our conclusion is correct.

In the case of Blake v. Ferris (5 N. Y. 48) the doctrine of respondeat superior received the fullest exposition, and the teaching of the case is adverse to the plaintiff here. It was there decided that the immediate employer of the servant, through whose negligence an injury occurred, was personally responsible therefor, and that rule is in accordance with reason and justice when applied to this case. The defendant surrendered the boat and crew to Mink and Burnett, and during the continuance of the charter party they exercised absolute authority over both; so far as the crew was concerned, they were subject to the orders of Mink and Burnett. It was, therefore, their duty to prevent the molestation of the passengers by the crew, and there was none other who could. The defendant had no superintendent or other person on board to exercise any supervision or care, and as it was destitute of power it should be held free from responsibility. The appellant has referred to an English case where the lessee of a ferry hired from the defendants a boat and crew for one day to carry passengers across. He received the fares and paid the defendant for the boat. They sent the crew and paid them. The plaintiff, who was a passenger, went on board for the purpose of crossing, and was injured while there by the breaking of some of the tackle by the negligence of the crew, and the court permitted a recovery. It appeared in that case, however, that the crew was controlled by the defendants, and beside that, the cause of the injury was the breaking of the tackle belonging to the boat. The case is not sufficiently analogous to this to render it authoritative. There are several English cases much like this. In the case of Milligan v. Wedge (12 Ad. & El. 737) the defendant, who was a butcher, employed a drover to drive an ox to his slaughter house; the drover employed a boy to drive the ox, and he permitted it to run into the show-room of the plaintiff, where he caused damage. The defendant had the verdict, which was sustained on appeal. In Quarman v. Burnett (6 M. & W. 497) the defendants owned a carriage and hired a pair of horses and driver to draw it for a short time, during which the horse and chaise of the plaintiff was injured by the carelessness of the driver, and a suit was brought against the defendants.

The plaintiff obtained the verdict, and the judge reserved the right to move for a non-suit, and upon that motion the decision was that the defendants were not liable, and a verdict was entered in their favor. The opinion in that case contains the following language: "That person is undoubtedly liable who stood in the relation of master to the wrongdoer, he who had selected him as his servant from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive

and obey. * * * But the liability by virtue of the principle of relation of master and servant must cease where the relation itself ceases to exist, and no other person than the master of such servant can be liable on the simple ground that the servant is the servant of another, and his act the act of another."

In the cases of Robinson v. Corbett (9 M. & W. 709); Allen v. Haywood (7 Ad. & El. 960), the facts were similar to the others, and the decisions were to the same effect. In the case of Langley v. Pointer (6 M. & W. 697), which was similar, the judges were divided upon the question.

The only English case which supports the contention of the plaintiff is Bush v. Steinman (1 Bos. & Pul. 404), but that case has been overruled and repudiated both in England and this country and is no longer entitled to any respect. (Blake v. Ferris, 5 N. Y. 62; Hillyard v. Richardson, 3 Gray 349.) This last case is very instructive, and the facts were these:

The defendant, who was the owner of a building by the roadside, entered into a written contract with one Shaw to alter the building into a dwelling house, and to furnish all materials necessary therefor. Shaw procured some boards and sent them by a teamster, who acted under his direction, to the place for use there, and the teamster piled them up by the side of the road. In a short time thereafter the plaintiff was riding along the road, when his horse became frightened by the boards and bolted from his course, and the plaintiff was thrown from his wagon and injured. The plaintiff obtained a verdict which was set aside in an elaborate opinion which held the defendant free from liability, and concluded with these words:

"Viewing this as a question not of authority, but to be determined by the application to these facts of settled principles of law, upon what principle can the defendant be held responsible for this injury? He did not himself do the act which caused the injury to the plaintiff; it was not done by one acting by his command or request; it was not done by one whom he had the right to command, over whose conduct he had the efficient control, whose operations he might direct, whose negligence he might restrain.

"It was not an act done for the benefit of the defendant and from the doing of which an implied obligation for compensation would arise. It was not an act done in the occupation of land by the defendant or upon land to which, upon the facts, he had any title."

These words apply with equal force to this case and are decisive of this appeal.

The judgment should be affirmed with costs.

Pratt, J., concurred; Brown, P. J., not sitting.

Judgment affirmed, with costs.[1]

[1] Compare Donovan v. Construction Syndicate, L. R. 1 Q. B. D. 629. See

GARRETTSEN v. DUENCKEL.

1872. Supreme Court of Missouri. 50 Mo. 104.

Appeal from St. Louis Circuit Court.

C. Weichman, for appellant.

The defence set up is that the salesman was not acting in the course of his employment, and that the master is not liable for damages resulting from an injury caused by the carelessness or negligence of the servant, in the performance of an act not within the scope of the service or the course of the employment of the servant, and which was expressly forbidden; also that there was no negligence. The principle of law holding the master liable for the acts of his servant or agent, rests on the ground that the master should not do or set another, or cause it to be done, with such negligence or want of skill as to injure third persons. This principle does not extend a wrong done by the servant while not engaged in the business of his master; nor does it reach a wrong caused by negligence in the performance of an act not directed by the master, or not within the scope of the agency or the course of the employment of the servant. (1 Am. Lead. Cas. 619.)

A master is not liable for any act or conduct of his servants which is not connected with the business in which they serve him, and does not happen in the course of their employment. Beyond the scope of his authority the servant is as much a stranger as any other person. (Schooner Dora, 19 How. 638; Sherman & R. Negl. (2d ed.) § 75, § 69; Power v. Bowen, Wash. 2; Mo. 300; Douglas v. Stephens, 18 Mo. 362, 367.) The servant can, by an unauthorized act of his own, raise a presumption against the master; the master in such case should not be liable to such a presumption than a stranger. The law will not infer authority to commit a trespass; and in order to hold the master liable for a trespass committed by a servant, it is necessary to show that the act was done while the servant was acting under the authority of the master; and if wrong be done by a servant without the authority of his master, and not for the purpose of executing his orders and doing his business, the master is not liable. (Cornish v. Stubbs, 20 Com. Jur.; Hays v. Gossmell, 19 Allen, 52, 53; 1 Lans. 89; 1 T. R. 480.) It was the duty of the plaintiff to show affirmatively that the act complained of was within the scope or course of the duty of the servant. (Wood v. Powell, 3 B. & Ad. 673; 1 Wilson v. Wood, 343, 345; Tuller v. Voght, 13 Ill. 273; Sharman v. Crockett, 2 East, 67.)

The only authority presumed by law is to do all lawful acts belonging to his employment, and the specific instructions of the mas-

[1] Statement of the case is condensed; arguments of counsel omitted.

GARRETZEN v. DUENCKEL.

1872. Supreme Court of Missouri. 50 Mo. 104.

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A master is not liable for any act or omission of his servants which is not connected with the business in which they serve him, and does not happen in the course of their employment. Beyond the scope of his authority the servant is as much a stranger as any other person. (Schouler Dom. Rel. 638; Sherman & R. Negl. 64, 71; id. 77, § 63; Foster v. Essex Bank, 17 Mo. 510; Douglas v. Stephens, 18 Mo. 336, 367.) No servant can, by an unauthorized act of his, raise a presumption against the master; the master, in such case, is no more liable to such a presumption than a stranger. The law will not infer authority to commit a trespass; and in order to hold the master liable for a trespass committed by a servant, it is necessary to show that the act was done while the servant was acting under the authority of the master; and if wrong be done by a servant without the authority of his master, and not for the purpose of executing his orders and doing his business, the master is not liable. (Church v. Mansfield, 20 Conn. 287; Howe v. Newmark, 12 Allen, 52; Mali v. Lord, 39 N. Y. 384.) It was the duty of the plaintiff to show affirmatively that the act complained of was within the scope or course of the duty of the servant. Wilson v. Peverly, 2 N. H. 548; Wright v. Wilcox, 19 Wend. 343, 345; Tuller v. Voght, 13 Ill. 285; McManus v. Crickett, 1 East, 67.)

The only authority presumed by law is to do all lawful acts belonging to his employment, and the specific instructions of the mas-

full discussion of the cases on this point in Baldwin v. Abraham, 57 App. Div. (N. Y.) 67.

ter determine the limits of the employment and scope of the duty of the servant; no master is chargeable with the acts of his servant but when they are done in the execution of the authority given him. When the servant oversteps his authority he becomes as a stranger, and the act not having been done in the service of the master, or within the limits of his authority, but contrary to his express and specific instructions, it was wilful, and the master is not liable. (Oxford v. Peters, 28 Ill. 435; Harris v. Nicholas, 5 Mumf. 489; Wright v. Wilcox, 19 Wend. 345; Armstrong v. Cooley, 5 Gill, 512; Joel v. Armstrong, 25 Eng. Com. Law, 512; McKeon v. Citizens' Railway Co., 42 Mo. 87-8.)

The cases of Joel v. Morison, 6 Carr. & P. 510, and Sleath v. Wilson, 9 Carr. & P. 607, cited by respondent in support of the proposition that it is immaterial whether the act complained of was done in disregard of the orders of the master, have been overruled by late authorities. (Mitchell v. Crassweller, 13 C. B. 237; 16 Eng. L. and Eq. 448, 451; Story v. Ashton, Law R. 4 Q. B. 476, 479; Bard v. Yohn, 26 Penn. St. 482.)

Jecko & Hospes, for respondent.

The master is responsible for the acts of his servant, done in the general scope of his employment and in pursuit of his master's business, and it is immaterial whether the particular act causing the injury was done in disregard of the general orders or specific commands of the master. (Joel v. Morrison, 6 Carr. & P. 510; Cleath v. Wilson, 9 Carr. & P. 607; Limpus v. London General Omnibus Co., 1 Hurlst. & Col. 526; Croft v. Alison, 4 B. & Ald., 6 Eng. Com. L. R.; Seymour v. Greenwold, 7 Hurl. & Nev. 355.) The rule of respondeat superior, or that the master shall be civilly liable for the tortious acts of his servant, is of universal application, whether the act be one of omission or commission, whether negligent, fraudulent or deceitful. If it be done in the course of his employment the master is liable; and if it makes no difference that the master did not authorize or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable if the act be done in the course of the servant's employment. (Philadelphia & R. R. R. Co. v. Derby, 14 How. 486; Southwick v. Estes, 7 Carl. 385; Luttrell v. Hazen, 3 Snead. 20; Pennsylvania R. R. Co. v. Vandivier, 42 Penn. St. 365; Oxford v. Peters, 28 Ill. 434; Howe v. Newmark, 12 Allen, Mass., 52-3.)

Wagner, Judge, delivered the opinion of the court.

This was an action against the defendant for damages caused by a wound inflicted on the plaintiff by the firing of a gun by a salesman who was in the employ of the defendant. The record shows that at the time of the happening of the injury the defendant was the keeper of a gun and ammunition store; that one Brewer was his servant, employed by him in selling arms and ammunition; and that, upon the occasion of the injury, the defendant being absent, Brewer

was showing a rifle of Henry's patent to a customer, who requested to have it loaded, in order that he might see how it worked, and refused to buy it unless it was done. Brewer at first refused, stating that it was against his orders to load firearms in the store, but for the purpose of making the sale he was finally persuaded and induced to load the gun, and in doing so it was discharged and shot the plaintiff, who was sitting at a window in a house on the opposite side of the street. The defense was that, inasmuch as the act of loading the gun was against the orders and instructions of the defendant, Brewer was acting outside of the scope of his employment and the defendant was not bound. This defense was overruled, and the jury found a verdict for the plaintiff, and the case is brought here by appeal.

The universally recognized rule is that a principal is civilly liable for the neglect, fraud, or other wrongful act of his agent in the course of his employment, though the principal did not authorize the specific act; but the liability is only for acts committed in the course of the agent's employment. A master is not responsible for any act or omission of his servant which is not connected with the business in which they serve him, though in general he is responsible for the manner in which they execute his orders, and for their negligence in selecting means by which the orders are to be carried out. In determining whether a particular act is done in the course of a servant's employment, it is proper first to inquire whether the servant was at the time engaged in serving his master. If the act was done while the servant was at liberty from his service, and pursuing his own ends exclusively, there can then be no question that the master is not responsible, even though the injuries complained of could not have been committed without the facilities afforded by the servant's relations to his master. (Shearman & R. Negl., § 63 and notes.) It may not, perhaps, be very easy to reconcile the numerous cases on this subject, but we think that the correct rule extracted and deduced from them will be found as above laid down.

The leading case cited and relied on for the appellant is McManus v. Crickett, 1 East, 106. But that decision rested entirely upon the distinction between trespass and trespass on the case under the old forms of pleading. That case only decided that trespass *vi et armis* would not lie against the master for the wilful trespass of his servant, which was not authorized or consented to by the master either directly or by implication, from the nature or subject-matter of the employment.

Lord Kenyon, in giving the judgment, says: "When a servant quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and according to the doctrine of Lord Holt his master will not be answerable for such an act." But he adds that "this doctrine does

not at all militate with the case in which a master has been holden liable for the mischiefs arising from the negligence or unskilfulness of his servant, who had no purpose but the execution of his master's orders," but that the form of such action must be case and not trespass.

The opinion contains nothing which bears upon this intermediate case of a servant who does not "quit sight of the object for which he is employed" but for the purpose of executing his master's orders, and in the course of his employment, does an act injurious to another, or in disregard of his rights.

A few cases may be cited as illustrative of the principle, to show the turning point of responsibility on the part of the master.

In the case of McClenaghan v. Brock, 5 Rich. Law, 17, plaintiff's slave was on board a steamboat as a passenger, and the second engineer of the boat, by negligently discharging a gun, wounded him while he was upon a lighter alongside of the steamboat, and it was held that the captain was not responsible. The engineer, it will be seen, was not acting, in the discharge of the gun, in any duty connected with his employment. He was doing something on his own account, independent of his business with the boat.

In the case of Mali v. Lord, 39 N. Y. 381, the plaintiff was in defendant's store purchasing goods, the defendant was absent at the time, and the superintendent and clerks suspecting the plaintiff of having stolen goods, called in a policeman and had her searched; no goods were found upon her. She then brought her action for damages, and the court decided that as the act was done without the knowledge or the express or implied authority of the proprietor or owner, the master was not liable; that the servant was not impliedly authorized by his master to do that which the master himself, being present, would not be authorized to do. The selling of goods, which was the only power conferred upon the servants, had nothing to do with the matter of making arrests for supposed offenses.

In McKenzie v. McLeod, 10 Bing. 385, the servant was employed to light fires in the house, and she lighted furze and straw with a view to clean a chimney that smoked, and in doing so the house caught fire and was burned up. The servant was cautioned against the danger of such a proceeding, and it was shown that it was no part of her duty, but that carpenters and masons were employed to cleanse the chimney, and that they had recently performed that work in the presence of the servant. Under these circumstances it was left to the jury to say whether the servant was acting within the scope of her duty; and the jury having found for the defendant, the court refused to grant a new trial. This case is criticized by the authors of the treatise on negligence, and they declare that, although the principle may be sound, it may well be doubted whether the jury did not err in finding that the act was not within the scope of the servant's general or ostensible authority.

Douglas v. Stephens, 18 Mo. 362, was an action for damages to the goods of the plaintiff in the cellar of his store, alleged to have been caused by the obstructions of a sewer by the servants of the defendants; and Scott, J., in delivering the opinion of the court, said: "Although a master is not liable in trespass as principal for the unlawful and directly injurious act of his servant unless he has commanded it, yet he is responsible for consequential damages where by the negligence and carelessness of the servant in doing the business of his employer, another receives an injury for which the servant would himself be liable in an action of trespass. To make the master liable for the consequential damages resulting from the trespass of the servant, it must appear that the servant was in the course of his employment, and that by an injudicious or negligent or unskilful act done in furtherance of his master's business the injury resulted to the plaintiff. But if the servant, wilfully and to effect some design of his own, does an injury to another, the master will not be liable."

To the same effect is the more recent case of Minter v. Pacific R. R., 41 Mo. 503, where we held that if a servant is acting in the execution of his master's order, and by his negligence causes injury to a third party, the master will be responsible, although the servant's act was not necessary for the proper performance of his duty to his master, or was even contrary to his master's order.

In Croft v. Alison, 4 B. & Ald. 590, the court of King's Bench say that "the distinction is this: If a servant driving a carriage in order to effect some purpose of his own, wantonly strikes the horses of another person and produces the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes, but injudiciously and in order to extricate himself from a difficulty, that will be negligent and careless conduct for which the master will be liable, being an act done in pursuance of the master's employment." The case showed that the defendant's servant had wilfully struck the plaintiff's horses while driving his master's carriage, in order to extricate himself from an entanglement of the carriages, occasioned by his own fault, and thereby had caused an injury to the plaintiff's carriage, and a verdict for the plaintiff was supported.

In Seymour v. Greenwood, 6 Hurl. & Norm. 359, Chief Baron Pollock asks the question, "Suppose a servant driving along a road, in order to avoid a danger, intentionally drove against the carriage of another, would not the master be responsible?" And in Limpus v. London General Omnibus Company, 1 Hurlst. & Col. 526, it was decided in the exchequer chamber that the master is responsible if the servant is in the course of doing the master's work and does the act to accomplish it.

In a recent well-considered case in Massachusetts, after a review of

the authorities, the court, speaking through Hoar, J., lays down the doctrine as follows: "In an action of tort in the nature of an action on the case, the master is not responsible if the wrong done by the servant is done without his authority, and not for the purpose of executing his orders or doing his work. So that if the servant, wholly for a purpose of his own, disregarding the objects for which he is employed, and not intending by his act to execute it, does an injury to another not within the scope of his employment, the master is not liable. But if the act be done in the execution of the authority given him by his master, and for the purpose of performing what the master has directed, the master will be responsible, whether the wrong done be occasioned by negligence or by a wanton or reckless purpose to accomplish the master's business in an unlawful manner." (Howe v. Newmark, 12 Allen 49.)

This exposition of the law fully coincides with the previous rulings of this court. The true ground upon which a master avoids responsibility for most of the wilful acts of his servants, when unauthorized by him, is that they are not done in the course of the servant's employment. When they are so done, the master is liable for them. Tested by those principles, the conclusion in this case is inevitable. Brewer, the servant, was unquestionably aiming to execute the order of his principal or master. He was acting within the scope of this authority and engaged in furtherance of his master's business. There is no pretense that he was endeavoring to do anything for himself. He was acting in pursuance of authority, and trying to sell a gun, to make a bargain for his master, and in his eagerness to subserve his master's interests he acted injudiciously and negligently. It makes no difference that he disobeyed instructions. Innocent third parties who are injured in consequence of his acts cannot be affected thereby. The instructions of the court fairly submitted the question of negligence to the jury, and are not obnoxious to any reasonable objection. The court committed no error in ruling out the evidence offered by the defendant for the purpose of showing that the act of loading or charging guns in a store is no part of the business of selling the same. If we admit that the servant did an unauthorized act, the evident truth still remains that it was done wholly in carrying out and executing his master's business, and in such a case the master will be held liable. When the servant acts in the course of his employment, although outside of his instructions, the master will be held responsible for his acts.

I see no error in the record, and with the concurrence of the other judges the judgment will be affirmed.[1]

[1] "The general rule may now be said to be that a master is responsible for the torts of his servant, done with a view to a furtherance of the master's business, whether the same be done negligently or wilfully, but within the scope of his agency. The fact that the servant, in committing the tort, may

HOFFMAN v. NEW YORK, N. H. & H. R. R. CO.

(Court of Appeals of New York. [illegible])

[illegible] from judgment of the general term of the [illegible] court of the city of New York, entered upon an order made [illegible], which affirmed a judgment in favor of plaintiff entered upon a verdict. (Reported below 14 J. & S. 566.)

This action was brought to recover damages for personal injuries suffered by the plaintiff [illegible] while engaged in the discharge of his duties as an employé of defendant. It was tried three times [illegible] and on the last trial the jury rendered a verdict for the plaintiff for $5,000.

The evidence on the plaintiff's behalf was as follows: [illegible], 1889, when he was a boy eight years old, he jumped on the front end of a car the third or fourth car from the engine, of a train of [illegible] cars that was proceeding on Eleventh avenue at a speed of about ten miles an hour. After he had gone a few blocks he was knocked off the car by a conductor or brakeman employed on the train, and falling with his leg across the [illegible] wheel of the car, it was crushed. Accompanied by one Voigt, who gave important testimony for the plaintiff, he was taken to a police station and then to the hospital, where his leg was amputated. There was a sharp conflict of testimony on several points, particularly in regard to the fact of the [illegible]. The testimony of defendant tended to show that the plaintiff was standing on the step by the rear of other cars who jumped on with him. The most important exceptions taken by the defendant were to the allowance by the trial judge of a question asked on cross-examination by plaintiff's counsel of Otto, the conductor in the train on which the accident occurred, and an instruction asked for by defendant, to which he answered that [illegible] and to the exclusion of the records of the police station referred to in the account, on which the plaintiff was taken soon after the accident.

Samuel Hand, for appellant. The authority to [illegible] a question from a train to motion has not been [illegible] or [illegible] given to the conductor. (Hayes v. The Third Ave. R. R. Co., 47 N. Y. [illegible]; Hayes v. Brennan, 43 id. 566; Hughes v. N. Y. & N. H. R. R. Co., 4 J. & S. 229; Wright v. Wilcox, 19 Wend. 343.) The act of the employé [illegible] occasion was wholly illegal, was entirely independent of and outside the employment of the conductor. (2 T. R. 400; 4 Selk. 641; Hayes v. Third Ave. R. R. Co., 47 N. Y. 259; Hayes v. N. Y. C. & H. R. R. R. Co., 70 id. 587; Coburn v. [illegible], 70 id. 133.) The question of the plaintiff as to the train was a [illegible] case and the court should not have [illegible]

HOFFMAN v. NEW YORK, ETC., RAILROAD CO.

1881. Court of Appeals of New York. 87 N. Y. 25.

Appeal from judgment of the general term of the superior court of the city of New York, entered upon an order made December 6, 1880, which affirmed a judgment in favor of plaintiff entered upon a verdict. (Reported below 14 J. & S. 526.)

This action was brought to recover damages for personal injuries suffered by the plaintiff from being kicked off defendants' cars by an employe of defendant. It has been three times tried, and on the last trial, the jury rendered a verdict for the plaintiff for $5,000.

The evidence of the plaintiff showed that on January 21, 1869, when he was a boy eight years old, he jumped on the front step of a car, the third or fourth car from the engine, of a train of defendants' that was proceeding up Eleventh avenue at a speed of about ten miles an hour. After he had gone a few blocks he was kicked off the step by a conductor or brakeman employed on the train, and falling with his leg under the hind wheel of the car, it was crushed. Accompanied by one Vogel, who gave important testimony for the plaintiff, he was taken to a police station and then to the hospital, where his leg was amputated. There was a sharp conflict of testimony on several points, particularly in regard to the fact of the kicking, the testimony of defendant tending to show that the plaintiff was knocked off the step by the rush of other boys who jumped on with him. The most important exceptions taken by the defendant were to the allowance by the trial judge of a question asked on cross-examination by plaintiff's counsel of Cross, the conductor of the train on which the accident occurred, and an important witness for the defense,—if he was not a grandson of Cornelius Vanderbilt, president of defendant, to which he answered that he was; and to the exclusion of the records of the police station in regard to the accident, to which the plaintiff was taken soon after he was hurt.

Samuel Hand, for appellant. The authority to remove a trespasser from a train in motion has not been expressly or impliedly given to the conductor. (Isaacs v. The Third Ave. R. R. Co., 47 N. Y. 122; Frazer v. Freeman, 43 *id.* 566; Hughes v. N. Y. & N. H. R. R. Co., 4 J. & S. 222; Wright v. Wilcox, 19 Wend. 343.) The act in its inception and execution was wholly illegal, and entirely independent of, and outside the employment of the conductor. (8 T. R. 299; 2 Salk. 641; Isaacs v. Third Ave. R. R. Co., 47 N. Y. 122; Peek v. N. Y. C. & H. R. R. R. Co., 70 *id.* 587; Cohen v. D. R. R. Co., 69 *id.* 173.) The intention of the plaintiff to tell the truth was a sharp issue in the case, and the court should not have expressed

have exceeded his actual authority, or even disobeyed his express instructions, does not alter the rule." Mitchell, J., in Smith v. Munch, 65 Minn. 256, 261.

an opinion in regard to his truthfulness. (Meyer v. Clark, 45 N. Y. 285.) Jurors cannot distinguish between a direction in a matter of law or fact, and the direction of the court in regard to matters of fact should be advisory. (Allis v. Leonard, 58 N. Y. 288; Watson v. Gray, 4 Keyes 385.)

Nelson Smith, for respondent.

The master is responsible for the wrongful act of his servant, where the servant was acting within the general scope of his authority, although he acted negligently, improperly or recklessly. (Rounds v. D., L. & W. R. R. Co., 64 N. Y. 129; Higgins v. Watervliet T. & R. Co., 46 *id.* 23; Rounds v. D., L. & W. R. R. Co., 3 Hun 329, 5 T. & C. 475; Cohen v. Dry Dock, E. B. & B. R. R. Co., 69 N. Y. 170-3; Limpus v. General Omnibus Co., 1 Hurlst. & Colt. 528; Wood's M. & S. 585; Shea v. Sixth Ave. R. R. Co., 62 *id.* 180; Peck v. N. Y. C. & H. R. R. R. Co., 6 T. & C (Sup. Ct.) 436.) When the act of the servant, assuming it to have been properly performed, is one which the master himself, if present, might have done, it will be presumed that it was an act within the scope of the servant's authority, and the burden of proof of want of authority rests upon the master. (Jackson v. Second Ave. R. R. Co., 47 N. Y. 274; Rounds v. D., L. & W. R. R. Co., 64 *id.* 129; Garretzen v. Duenckel, 50 Mo. 104; Oliver v. Northern Transportation Co., 3 Ore. 84; Poulton v. The L. & S. W. R. Co., L. R. 2 Q. B. 534; Brennan v. Fairhaven & W. R. R. Co., 45 Conn. 284.) The rules of a corporation are supposed to continue until they are shown to have been repealed. (1 Greenl. on Ev., §§ 41, 42, 43.) When a judge expresses an opinion on the evidence an exception will not lie, but the party must ask him to submit it to the jury. (3 Wait's Pr. 178, 205; Winne v. McDonald, 39 N. Y. 233; Dows v. Rush, 28 Barb. 157; Carnes v. Platt, 6 Rob. 270; Mallory v. Tioga R. R. Co., 36 How. 202; s. c. 1 Trans. App. 203; 3 Keyes 354.)

A general exception to a judge's refusal to charge is unavailing. (Ayrault v. Pacific Bank, 47 N. Y. 570; Decker v. Matthews, 12 N. Y. 313; Kluender v. Lynch, 4 Keyes 351; Caldwell v. Murphy, 11 N. Y. 416.)

Andrews, Ch. J.—The jury have found that the plaintiff was kicked from the car while in motion, by the conductor or brakeman. There was a very sharp conflict of evidence upon this question. The testimony of the conductor and brakeman, and of a bystander, tended strongly to show that neither the conductor, nor brakeman touched or said anything to the plaintiff, and that he and other boys jumped off the platform of the car as the brakeman came out of the door.

It is not claimed that the finding of the jury upon this issue is unsupported by evidence and the point is not raised by any exception, but it is insisted that the act of kicking a boy from a car while in

motion, assuming that it was done by the conductor or brakeman, was not within the scope of any authority conferred by the defendant upon the person in charge of the train, but was an illegal, wanton, and wilful act, for which the employer is not responsible.

By the general regulations adopted by the defendant, in force at the time of the transaction in question, the conductor has charge of the train, and is responsible for its safe and proper management, and brakeman, and other servants thereon, are subject to his orders. He is authorized to remove from the car persons who refuse to pay their fare, or are drunk, riotous, or unruly; but the regulations declare that in exercising this authority he must be governed by the provisions of law. The only provision of law on the subject is found in section 35 of the General Railroad Act (Laws of 1850, chap. 140), which provides that if any passenger shall refuse to pay his fare, it shall be lawful for the conductor to put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place, or near any dwelling-house, on stopping the train. The regulations defining the duties of brakemen, introduced by the defendant, are not printed in the case, and there is no proof before us of any specific authority given to brakemen to remove trespassers from the cars. It is conceded that authority in a conductor to remove a trespasser in a lawful manner, whether conferred by the rules or not, is implied, and is incident to his position. We think the same concession must be made in respect to the authority of a brakeman who finds a trespasser on the platform of a car. His duties do not primarily pertain to the protection of the cars against intruders; but he is a servant of the company on the train, concerned in its management, and fully cognizant of the obvious fact that intruders, who jump upon the train for a ride, without intention of becoming passengers, are wrongfully there. Suppose a train was standing still, and a trespasser was put off by force by a brakeman, using no unnecessary violence, would it not be a good defense to an action against him for the assault that he was a brakeman, and did the act complained of in that capacity, although without express authority? The implied authority in such a case is an inference from the nature of the business, and its actual daily exercise, according to common observation and experience. But assuming authority in the conductor or brakeman to remove a trespasser in a lawful manner, the question remains, whether when a conductor or brakeman, without warning or notice of any kind, kicks a boy of eight years from the platform of a car, while the train is running at a speed of ten miles an hour, he can be said to be acting within the scope of his employment, so as to make the company liable for the act. Assuming the case made by the plaintiff, the act was flagrant, reckless and illegal; but the point is, was the act within the scope of the employment and authority? If it was, and the servant in doing what he did undertook to act for the company, and not for him-

self or for his own ends, the company is not exonerated, although the servant may have deviated from instructions in executing the authority, or may have acted without judgment, or even brutally. The removal of trespassers from the cars was, as we hold, within the implied authority of the defendant's servants on the train. The fact that they acted illegally in removing the plaintiff while the train was in motion does not exonerate the defendant. In some cases, where the existence of an authority in the servant to do a particular act is in controversy, and the authority is sought to be established by inferences and implications, it may be a material circumstance bearing upon the non-existence of the authority sought to be implied, that the act was one which the master could not do himself, without a violation of the law. But this fact would not be decisive. No doubt the kicking the boy off the car was not only a wrong to the plaintiff, but was a violation of the duty which the train servants owed to the defendant, to exercise proper care in executing the authority confided to them; but in most cases, where the master has been held liable for the acts of a servant, the tortious act was a breach of the servant's duty. In this case, the authority to remove the plaintiff from the car was vested in the defendant's servants. The wrong consisted in the time and mode of exercising it. For this the defendant is responsible, unless the brakeman used his authority as a mere cover for accomplishing an independent and wrongful purpose of his own. The general subject has been recently considered in this court, and it is unnecessary further to elaborate it. (Higgins v. The Watervliet Turnpike Co., 46 N. Y. 23; Rounds v. D. L. & W. R. R. Co., 64 *id.* 129.) We think the court would not have been justified in taking the case from the jury. * * *

All concur.

Judgment affirmed.[1]

[1] In Fulton v. Wilmington Star Mining Co., 133 Fed. 193, a statute provided that no one could be employed as manager of a mine unless he had obtained a certificate of competency from the state board of examiners. It was held that this statute did not exempt the employers of a licensed manager from liability for injuries caused by the manager's negligence. See Durkin v. Kingston Coal Co., 171 Pa. St. 193. Compare these cases with Homer Ramsdell Transportation Co. v. La Compagnie Generale Transatlantique, 182 U. S. 406, in which it was decided that a shipowner is not liable for injuries resulting from the negligence of a pilot, who was accepted by the shipowner under a statute compelling the employment of a licensed pilot.

THE OAKLAND CITY AGRICULTURAL AND INDUSTRIAL SOCIETY v. [illegible]

[Sup. ... Appellate Department, ... Dec. ... 1893.]

COMPLAINT.—This action was brought by [illegible] the agricultural society for damages resulting from an assault committed upon its plaintiff by a servant of the defendant.

The complaint was in two paragraphs, the first of which averred in substance, that the defendant is an agricultural society, incorporated under the laws of this state, and as trustee, owns a tract of land on which agricultural and other industrial products were exhibited, and to which the general public were invited; that the plaintiff was in the employ at such fair, as a policeman and gatekeeper, one William Swallow, whose duty was to preserve peace and good order, and to exclude those who were not entitled to admission, and to eject those who were disorderly; that plaintiff held a pass entitling him to admission to said fair, and he peaceably entered the fair grounds, and while lawfully thereon the "defendant's said employee Swallow, pretending that plaintiff had not passed said fair grounds properly, and that plaintiff ought to be ejected therefrom by said employee, and that plaintiff had no right of entrance to said grounds, and in effect by said employee to exclude the plaintiff from said fair grounds, said employee then and there acting as such employee, without any cause or provocation whatever, assaulted the plaintiff and beat and wounded him with a club on and about his head and face, so [illegible] permanently disabled.

The second paragraph alleges that said Swallow was possessed of a "cruel and quarrelsome disposition," which [illegible] by the duties of said employment, but the defendant negligently engaged said Swallow as aforesaid, [illegible] and that the plaintiff had the right to go upon the said fair ground, and while lawfully and peaceably attempting so to do, said Swallow "without any cause or provocation therefor, but in a spirit of cruelty, malice and wantonness, fell upon the plaintiff and violently ejected him from said fair ground," and while so doing assaulted and beat him with a club so that his nose was broken and he was otherwise [illegible] permanently injured.

A demurrer to each paragraph of the complaint was overruled, and the cause, put at issue by the general denial, was tried by a jury, who found for the plaintiff and assessed his damages at $475. Judgment was rendered upon the verdict, and the defendant appeals and assigns as error the ruling upon the demurrer to each paragraph of the complaint, and in refusing a new trial.

The point is made against the first paragraph of complaint that a tort to cover the assault complained of was prescribed by the [illegible] while he was acting in the line of his employment. It

self or for his own ends, the master is not concerned, although the servant may have committed excesses in executing the authority or may have used unnecessary violence, or even brutality. The removal of [illegible] was, as we hold, within the implied authority [illegible] servants on the train. The fact that they acted [illegible] the plaintiff while the train was in motion does not [illegible] the defendant. In some cases, where the [illegible] in the servant to do a particular act is in question [illegible] authority is sought to be established by inferences and conclusions [illegible] a material circumstance bearing upon the [illegible] authority sought to be implied, that the act [illegible] reason could not do himself, without a violation [illegible] was not would not be decisive. No doubt the [illegible] of the act was not only a wrong to the plaintiff, but [illegible] of the duty which the train servant owed to the company to [illegible] proper care in executing the authority [illegible] to most cases, where the injury has been [illegible] for the acts of a servant the tortious act was a [illegible] and a mere. In this case, the authority to remove [illegible] was vested in the defendant's servants [illegible] and mode of exercising it. For [illegible] responsible, unless the brakeman used his authority [illegible] accomplishing an independent and [illegible] end. The general subject has been re[illegible] in this court, and it is unnecessary further to [illegible], The Wilmington Turnpike Co., 46 N. Y. 23; Keeney v. N. W. R. R. Co., 62 id. 129.) We think the court [illegible] justified in taking the case from the jury.

All concur.

Judgment affirmed.

In Fuller v. Wilmington Mining Co., 152 Fed. 595, a statute provided that no one should be employed as manager of a mine unless he had obtained a certificate of competency from the state board of examiners. It was held that the [illegible] for the company's negligence. See Dorsey v. Delaware Coal Co., [illegible] 1 Sup. Court. Compare these cases with Homer [illegible] Transportation Co., [illegible] Compagnie Générale Transatlantique, 182 U. S. [illegible] was [illegible] a shipowner is not liable for injuries [illegible] from the negligence [illegible] accepted by the shipowner [illegible] a compulsory employment of a licensed pilot.

THE OAKLAND CITY AGRICULTURAL AND INDUSTRIAL SOCIETY v. BINGHAM.

1891. APPELLATE COURT OF INDIANA. 4 Ind. App. 545.

CRUMPACKER, J.—This action was brought by Bingham against the agricultural society for damages resulting from an alleged assault committed upon the plaintiff by a servant of the defendant.

The complaint was in two paragraphs, the first of which alleges in substance, that the defendant is an agricultural society, incorporated under the laws of this state, and in August, 1890, it held a fair, at which agricultural and other industrial products were exhibited, and to which the general public were invited; that the defendant had in its employ at such fair, as a policeman and gatekeeper, one Willis Swallow, whose duty was to preserve peace and good order, and to exclude those who were not entitled to admission, and to eject those who were disorderly; that plaintiff held a pass entitling him to admission to said fair, and he peaceably entered the fair grounds thereon, and while lawfully therein the "defendant's said employe, Swallow, pretending that plaintiff had not entered said fair grounds properly, and that plaintiff ought to be ejected therefrom by said employe, and that plaintiff had no right of entrance to said grounds, and in an effort by said employe to exclude the plaintiff from said fair grounds, said employe then and there acting as such employe," without any cause or provocation whatever, assaulted the plaintiff and beat and bruised him with a club on and about his head and face so that he was permanently disabled.

The second paragraph alleges that said Swallow was possessed of a "cruel and quarrelsome disposition," which unfitted him for the duties of said employment, but the defendant negligently engaged him therein without investigating his fitness or qualifications therefor; that the plaintiff had the right to go upon the said fair ground, and while lawfully and peaceably attempting so to do said Swallow, "wholly without cause or provocation therefor, but in a spirit of oppressive malice and wantonness, fell upon the plaintiff and violently ejected him from said fair ground," and while so doing assaulted and beat him with a club so that his nose was broken and he was otherwise permanently injured.

A demurrer to each paragraph of the complaint was overruled and the cause, put at issue by the general denial, was tried by a jury, who found for the plaintiff and assessed his damages at $275. Judgment was rendered upon the verdict, and the defendant appeals and assigns for error the ruling upon the demurrer to each paragraph of complaint and in refusing a new trial.

The point is made against the first paragraph of complaint that it fails to show the assault complained of was perpetrated by the gate-keeper while he was acting in the line of his employment. It

is insisted with much persistence and plausibility that the averments that appellee was rightfully upon the fair ground, and was orderly and peaceable, show the assault was not committed by the gatekeeper in his capacity as a servant, because he was only authorized to eject objectionable persons, and the pretext that appellee was objectionable, being without foundation, did not characterize the act as one for which the appellant was responsible. The relation of master and servant existed between the appellant and the gatekeeper, to which relation the doctrine of respondeat superior obtains. A master is responsible not only for the omissions and shortcomings of his servant, but for positive misfeasance in the line of duty. Such responsibility is founded upon the theory that the master authorized the wrong, either expressly or by implication. It is a fiction of the law that the master is always present in the conduct of his business, and any wrong committed by a servant while so engaged, though tortious and malicious in its character, is the wrong of the master. Authority in the physical absence of the master is often implied from the nature of the employment and the character of the act, though it be shown to have been in violation of the express command of the master. But the application of this principle, for cogent reasons, extends only to acts properly within the range of the employment. A master does not stand sponsor for the deportment of one in his service except while he is actually engaged about the master's business. It is very difficult in some cases to determine what acts are to be imputed to the master and what not; but where the servant clearly departs from his employment, and performs an act for some purpose of his own, independent of, and not connected with, the master's affairs, the latter cannot be held liable therefor.

It was said by Lord Kenyon, in McManus v. Crickett, 1 East 106: "When a servant quits sight of the object for which he is employed, and without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and according to the doctrine of Lord Holt, his master will not be answerable for such act."

It was the early rule that the master could not be held for the wilful wrongs of the servant, even in the line of the employment, but that rule has been quite generally discarded by the modern adjudications. The test seems to be, was the act complained of done within the general scope of the employment, and with a view of accomplishing some end thereof? If so, the employer will be answerable, though the act be ill-advised, malicious, and against his express order. Pittsburgh, etc., R. W. Co. v. Kirk, 102 Ind. 399; Phelon v. Stiles, 43 Conn. 426; Adams v. Cost, 62 Md. 264; Howe v. Newmarch, 12 Allen 49; Golden v. Newbrand, 52 Iowa 59; Rounds v. Delaware, etc., R. R. Co., 64 N. Y. 129; Quinn v. Power, 87 N. Y. 535; Wood Master and Servant, pp. 593 and 594.

But a master will not be held liable for the act of a servant who employs his position as a cloak to protect him in the prosecution of a purely private purpose, unconnected with the business of the former. Evansville, etc., R. R. Co. v. Baum, 26 Ind. 70; Gilliam v. South, etc., R. R. Co., 70 Ala. 268; Rounds v. Delaware, etc., R. R. Co., *supra.*

Where a master employs one in a vocation requiring him to act under certain conditions and commits to his discretion the duty of determining when and what action may be necessary, the employer will be responsible for the misjudgment, as well as the misconduct, of the servant, and if he acts when there is no occasion for it at all, though intending to accomplish some end of the employment, such responsibility will still exist.

This doctrine is applicable to the case in judgment, as it appears that the gate-keeper was authorized to preserve order and eject those who were not rightfully upon the fair ground, and the duty of judging when one was disorderly or was wrongfully upon the ground seems to have been committed to him. If, in the exercise of such judgment, he *wrongfully* ejected appellee from the ground, or if a fancied violation of some rule of demeanor so excited the gate-keeper's anger that he inflicted a malicious injury in attempting to enforce its observance, the appellant should be held for the result. The paragraph under consideration contains an averment that the gate-keeper perpetrated the assault while acting as such, and this averment, though general, is not repugnant to any other allegation, and in the light of the principles noted it must be held sufficient.

A radically different question arises upon the second paragraph of complaint. It is based upon the theory that appellant was bound to exercise reasonable care in the selection of a gate-keeper, and having failed to do so it should be answerable for the wrongs of that functionary, whether they occurred in the line of his employment or not. Every person owes a duty to those upon his premises lawfully and by his invitation, express or implied, to see that they are not exposed to danger as far as reasonable care and vigilance can protect them.

One has no right to maintain a dangerous pitfall upon his premises where injury is likely to result to one lawfully thereon, nor has he the right to keep a ferocious animal likely to injure those rightfully upon his premises, but we know of no instance in which this principle has been applied to the employment of servants. Every sane person is solely responsible for his own conduct except where he acts for or with another. An employer cannot be held to account for failing to exercise care in the selection of a suitable person for a given position unless the failure to discharge the duties of the position properly resulted in an injury to another; and where an injury so results, the employer is liable, regardless of the amount of

care he may have used in the selection of the servant. Counsel for appellee in support of the ruling of the court cite: Chicago, etc., R. W. Co. v. Harney, 28 Ind. 28; Ohio, etc., R. W. Co. v. Collarn, 73 Ind. 261; Indianapolis, etc., R. W. Co. v. Johnson, 102 Ind. 352; Lake Shore, etc., R. W. Co. v. Stupak, 108 Ind. 1.

These cases have no application whatever to the question under consideration. They relate solely to the duty of the master to one servant in respect to the employment and retention of co-servants, yet they are all grounded upon the principle that the master is responsible only for misconduct in the line of employment, even where he negligently employs an incompetent servant.

The case of Sweat v. Rogers, 6 Heisk. 117, was an action for damages committed by two slaves owned by the defendant in burning and robbing the plaintiff's storehouse. The complaint alleged that the slaves were of "bad character for stealing and pilfering," and the defendant being cognizant of their character and habits in that respect, allowed them to go abroad, and took no steps to prevent them from practicing their pilfering propensities. The complaint was held bad because the wrong complained of was not done in the line of duty for the master.

In the case of Curtis v. Dinneen (Dak.), 30 N. W. Rep. 148, the defendant was an innkeeper and the plaintiff was her guest, and sued for an assault and battery perpetrated by the defendant's servant. The complaint did not show that the servant was acting in the line of his engagement at the time he committed the assault, but it alleged that he "was of a rough, brutal, passionate and ferocious disposition," and was in the habit of assaulting and beating guests, which the defendant well knew, but negligently retained him in her service in and about the inn after such knowledge. The culpable servant was the defendant's husband, and while the court expressed some doubt respecting her liability for failure to discharge him on that ground, it was also declared that she was not responsible upon any theory, because the injury was not inflicted by the servant while engaged as such. See, also, McCann v. Tillinghast, 140 Mass. 327.

We know of no principle upon which the paragraph of complaint in question can be upheld, and it was reversible error to overrule the demurrer to it.

Complaint is also made of the action of the court in refusing to give instructions three and six, requested by appellant.

No. 3 was substantially covered by others given, so no available error occurred in refusing it.

No. 6 was as follows: "If you find from the evidence that the striking and beating complained of were done by one Willis Swallow, a servant of the defendant at the time of said striking and beating, and said servant himself was without fault and in a place in which he had a right to be, and that he did the striking and beating of the plaintiff in the honest exercise of the right which the law gave

him of defending his own person against an unlawful assault upon him by the plaintiff, whereby he was in danger of suffering great bodily harm, then you must find for the defendant, because a beating of the plaintiff under such circumstances could not be held to be the act of the defendant."

This instruction was refused, we are informed by counsel, upon the ground that it was predicated upon the defense of *son assault demesne*, and that being an affirmative defense, could not be asserted under the issues created by the general denial. Norris v. Casel, 90 Ind. 143, is relied upon in support of the action of the court. It is true, where an individual is sued for an assault the general traverse only puts in issue the fact of the perpetration of the assault by him. *Son assault demesne* is an affirmative defense, which admits the trespass complained of, but advances facts to justify it.

The first paragraph of the complaint in the case before us charges an assault by appellant's servant while in the performance of duty as such, thus by construction of law making it the appellant's assault. It was incumbent upon appellee to prove not only the commission of the trespass, but that it was committed by appellant's servant while so engaged. The general denial put all these facts in issue, and any evidence was admissible thereunder tending to disprove the trespass or to prove that the servant, when he perpetrated it, was not acting for appellant. If it were true that appellee assaulted the gate-keeper first and the latter undertook to defend himself, and while so engaged inflicted the injury complained of, it would exclude the imputation of authority from appellant, because it would show that the gate-keeper was acting for himself and not for appellant at the time. This would be a good defense, not of *son assault demesne*, but that it was not appellant's trespass. If A is sued for an assault, he may, under the general denial, show that the assault complained of was committed by B, and thus exclude the idea of his guilt. This was clearly the theory of the instruction under consideration, and we are of opinion that the court erred in refusing it.

Other questions are discussed by counsel, but they are of such a character that they will not likely arise at another trial, so we will not extend this opinion to decide them.

The judgment is reversed, with instructions to sustain the demurrer to the second paragraph of complaint.[1]

[1] *Accord:* Evansville & Terre Haute Co. v. McKee, 99 Ind. 519. See Wright v. Wilcox, 19 Wend. (N. Y.) 343. Compare last case with Mott v. Ice Co., 73 N. Y. 543, and Levy v. Ely, 48 App. Div. (N. Y.) 554.
See also Little Miami R. R. Co. v. Wetmore, 19 Ohio St. 110.

GOLDEN v. NEWBRAND et al.

1879. Supreme Court of Iowa. 52 Ia. 59.

Appeal from Mahaska Circuit Court.

It is stated in the petition that the "defendants unlawfully wilfully and maliciously killed David Golden," and this action is brought to recover damages caused by said act. The answer consisted of a general denial. There was a trial before the court. On the conclusion of the plaintiff's evidence the defendants moved the court to exclude all evidence introduced, "because it was incompetent, immaterial and irrelevant, and failed to show any liability on the part of the defendants." The motion was sustained and judgment rendered for the defendants for costs. The plaintiff appeals.

Seevers, J.—I. At the proper time the defendants asked the court to make a finding of facts. As this was not done, it is insisted this constitutes prejudicial error. If no competent evidence was introduced, no finding of facts could be made. The theory of the court was that no fact had been established by legitimate evidence. The case stood before the court as if no evidence had been introduced. If this is correct, then there was no error in failing to make a finding of facts.

II. Using the language of appellant's counsel, the following facts were established: "That the defendants, ever since 1876, have been owning and operating a brewery in the city of Oskaloosa, Iowa, under the firm name and style of Blattner & Newbrand, and that Charles Blattner, during all that time, has been and is now their superintendent, managing and running the business, and that one Max Roenspeiss during all that time has been and is now a hand employed in the business there under the control of Charles Blattner, and paid his wages by him out of the firm moneys, and that a part of his business was to guard the brewery, and he slept there at night for that purpose, and that there was a revolver kept there by the firm, and Roenspeiss had access to it and slept with it under his pillow at night; that defendants were engaged in the business of manufacturing and selling beer, and, like all beer saloons, rows were likely to occur, and Roenspeiss was empowered to protect the property and to quell disturbances, and worked there in the business generally.

"In the afternoon of the day David Golden was killed, he and his brother were there drinking beer, and got kicked out of the brewery. Afterwards, about supper time, they went back to the brewery and drank some more beer, and being a little drunk, mad and crazy, John Golden got into a little fracas with John Mackey, and they skirmished until they got out of the brewery. In the meantime Max Roenspeiss came out of the office, where the revolver was kept, and approached the east door, and just about that time David Golden, being out of doors on the east side of the brewery, threw a brick

into the brewery, and hit the copper under, and blasphemed started out of the yard door after him, and Dube, fearing the ruin, when Bourgeois, after going fifteen or twenty feet from the brewery, fired and shot Dube in the back of the head, and he died instantly on the spot, about four or five feet from the brewery.

Counsel for the contract was to show that it did not, in any manner, throw that defendants were liable. It was, therefore, immaterial and not properly admitted. The theory of appellant is that Bourgeois was employed to guard and protect the brewery and which purpose he was furnished with a pistol, and that he shot deceased while in the line of his duty. Without determining whether it this was all the correctness would be liable, we think the fact that the deceased was retreating from the brewery, at the time he was shot, shows conclusively it was not fired for the purpose of protecting the brewery, or in the line of Bourgeois' duty. If Bourgeois had shot with the pistol from the brewery a person accidentally passing along the highway, the defendants clearly would not have been liable, and we think there is no essential difference between the case supposed and the case at bar. To protect the brewery did not require Bourgeois to shoot and kill a person who was retreating therefrom. The killing was not, therefore, done in the line of the duty Bourgeois was employed to perform.

Affirmed.

CATON v. RIDGWAY, ETC., RAILWAY CO.

(1871. Supreme Judicial Court of Maine. 59 Me. 344.)

Action to recover damages for injuries upon and injury to plaintiff's lands, through which defendants railroad was located. The case consisted of acts of rubbing of a rail through plaintiff's lands outside the location of the railroad, also the building of fires and temporarily permitting them to spread and keep plaintiff's timber, and the taking of timber for building certain bridges. The opinion states the case.

APPLETON, C. J.—In 1850 the Androscoggin corporation received a charter to build a railroad from Bangor to Mattawamkeag, and thence to our boundary line of New Brunswick. The charter expired several times, but was renewed from time to time, and, ultimately, December 30, 1863, was fixed for the final completion of the road.

On 5th August, 1863, the defendant corporation entered into a contract with Peter S. Bradley for the construction of a railroad from Bangor to St. John, in New Brunswick. It was intended

[1] A portion of the opinion relating to a question of evidence is omitted.

into the brewery, and hit the copper cooler, and Roenspeiss started out of the east door after him, and Dave turned and ran, when Roenspeiss, after going fifteen or twenty feet from the brewery, fired and shot Dave in the back of the head, and he fell forward on his face, about forty or fifty feet from the brewery."

Conceding the evidence was as above stated, it did not, in our opinion, show that defendants were liable. It was, therefore, immaterial, and was properly excluded. The theory of appellant is that Roenspeiss was employed to guard and protect the brewery, for which purpose he was furnished with a pistol, and that he shot the deceased while in the line of his duty. Without determining whether if this was all the defendants would be liable, we think the fact that the deceased was retreating from the brewery, at the time the fatal shot was fired, shows conclusively it was not fired for or with the intent of protecting the brewery, or in the line of Roenspeiss' duty. If Roenspeiss had shot with the pistol from the brewery a person peaceably passing along the highway, the defendants clearly would not have been liable, and we think there is no essential difference between the case supposed and the one at bar. To protect the brewery did not require Roenspeiss to shoot and kill a person who was retreating therefrom. The killing was not, therefore, done in the line of the duty Roenspeiss was employed to perform.[1] * * *

Affirmed.

EATON v. EUROPEAN, ETC., RAILWAY CO.

1871. Supreme Judicial Court of Maine. 59 Me. 520.

Action to recover damages for trespass upon and injury to plaintiff's lands, through which defendant's railroad was located. The acts complained of were the building of a road through plaintiff's lands, outside the location of the railroad; also the kindling of fires and negligently permitting them to spread and burn plaintiff's timber, and the taking of timber for building hovels and camps. The opinion states the case.

Appleton, C. J.—In 1850 the defendant corporation obtained a charter to build a railroad from Bangor to Mattawamkeag, and thence to the boundary line of New Brunswick. The charter expired several times, but was revived from time to time, and, ultimately, December 31, 1872, was fixed for the final completion of the road.

On 7th August, 1865, the defendant corporation entered into a contract with Pierce & Blaisdell for the construction of a railroad from Bangor to St. John, in New Brunswick. It was specified

[1] A portion of the opinion regarding the admissibility of evidence is omitted.

therein that the work should "be constructed under the general supervision and direction of the chief engineer of said company, as required by the contract and specification;" and that the railroad was "to be built on the line as located, or to be located and marked out by the engineers of the company."

This contract, by the consent of the defendant, was assigned by Pierce & Blaisdell to the International Railway Construction and Transportation Company. On 24th May, 1869, this company contracted with Brooks & Ryan "to construct, build, complete and finish in a good, substantial and workmanlike manner, under the superintendence of the chief engineer of the E. & N. A. R. Co., for the time being," all the work within certain limits defined in said contract, at a certain sum per mile. Brooks & Ryan were to make good any damages to the adjoining lands caused by blasting and removing fences, etc.

On November 1, 1869, Brooks & Ryan contracted with Riley & Bunston for all the grading, etc., of the portion of the railway between stations No. 650 and No. 746, the work to be done in accordance with the contract of May 24th, 1869, between said International Railway Construction and Transportation Company and said Brooks & Ryan. There was likewise a similar contract between Brooks & Ryan and Wiseman for the grading between stations No. 800 and No. 854.

The acts of which complaint is made, and for which damages are sought to be recovered, are those of Riley & Bunston and of Wiseman, or of those in their employ. The relation of master and servant did not exist between them and the defendants. They were not under the direction and control of the defendants. They were not employed and could not be dismissed by the defendants. They were sub-contractors or the servants of sub-contractors. The sub-contractors were responsible to those with whom they had contracted, and their servants to those in whose service they were laboring.

When the contract is to do an act in itself lawful, it is presumed it is to be done in a lawful manner. Unless, therefore, the relation of master and servant exists, the party contracting is not responsible for the negligent or tortious acts of the person with whom the contract is made, especially if those acts are outside of the contract. If the injury was the natural result of work contracted to be done, and it could not be accomplished without causing the injury, the person contracting for doing it would be held responsible. Butler v. Hunter, 7 H. & N. 826. In Reedie v. The London & N. W. R. Co., 4 Exch. 244, a company empowered by act of parliament to construct a railway, contracted under seal with certain persons to make a portion of the line, and by the contract reserved to themselves the power of dismissing any of the contractors or workmen for incompetence. The workmen, in constructing a bridge over a public highway, negligently caused the death of a person passing beneath the

[illegible] to plaintiff's horse to fall upon him. It was held, in a suit by the administrator, that the company was not liable. In Dyckman v. Foreman, 73 E. C. L. 809, a contractor who employed officers to put a certain portion, and entered into a written contract with [illegible] which the latter was to do the paving of the streets, the materials being supplied by A and [illegible] as the work progressed. Frequently in paving, the stones were laid by laborers in the employ of [illegible] railways, and there [illegible] marked the edges so as to facilitate the work. The plaintiff fell over them and was injured. It was held that A was responsible for the accident, and Lord [illegible] said: "I think," says Maule J., "the present case falls within the principle of those cases where a party employs one who is [illegible] to do work for him, and who employs [illegible] to do it, and by the negligence of the servants of the latter some one else is injured. In such a case the employer is not responsible for the negligence of the servants of the person employed, but only for the negligence of the person employed by him." In Blake v. Thirst, 2 H. & C. 20, the defendant contracted with certain individuals to construct a sewer in a public highway, who employed one C to fill in the earth over the brick work. [illegible] C left the earth at such a [illegible] above the level of the road that the plaintiff, driving by on the dark, was thereby upset and injured. It was held that the defendants were not responsible for the negligence of C. In Sadler v. Henlock, 4 E. & B. 570, the defendant employed somebody to do what might be done in a proper and safe manner. It was done negligently and improperly, and the plaintiff was injured, but it was not thus done by the defendant's own immediate servants, and they were not held responsible. So in the case at bar, the negligence complained of was that of the sub-contractors or of their servants; they are the acts of the immediate employees, and of those who are done by their procurement, and not of the contractor or his servants [illegible] them, [illegible] are liable.

In connection with these cases on the doctrine of [illegible] to [illegible] Peters, 5 C. B. 549, it was held that the defendants were not liable for the act of their contractor in [illegible] a sewer in a public street, and also held [illegible] under which he was to [illegible] to [illegible] at a [illegible] price for [illegible] were not liable to third persons for any injury [illegible] in an negligent manner to which the work was [illegible] to the [illegible] or its [illegible]. The [illegible] was that the immediate employer of the servants whose negligence caused the injury is alone responsible for the negligence of such servants. These cases were followed in Wolf v. Mayor, [illegible] New York, 2 N. Y. 489. In Kelly v. Mayor, [illegible] New York, 11 id. 432, the corporation of the city of New York had [illegible] a sewer to be [illegible], and contracted with a person to do the [illegible]. It was held that they were not liable for damages occasioned by the negligence of the person who had contracted to do the work, or of the [illegible] in his employ. In Clark v. Fry, [illegible] Daniels & R. R. Co., 8 Ohio St. 358, and in Cuyler v. The Rockaway and

bridge, by allowing a stone to fall upon him. It was held, in a suit by the administratrix, that the company was not liable. In Overton v. Freeman, 73 E. C. L. 866, A contracted with parish officers to pave a certain district, and entered into a sub-contract with B, under which the latter was to do the paving of the street, the materials being supplied by A and brought to the spot in carts. Preparatory to paving, the stones were laid by laborers, in the employ of B, on the pathway, and there left unguarded during the night, so as to obstruct the same. The plaintiff fell over them and was injured. It was held that B was responsible for the negligence, and not A. "I think," says Maule, J., "the present case falls within the principle of those authorities which have decided that the sub-contractor, and not the person with whom he contracts, is liable civilly, as well as criminally, for any wrong done by himself or his servants in the execution of the work contracted for." In Peachey v. Rowland, 76 E. C. L. 181, the defendant contracted with certain individuals to construct a drain in a public highway, who employed one C to fill in the earth over the brick work, and to carry away the surplus. C left the earth so much raised above the level of the road that the plaintiff, driving by in the dark, was thereby upset and injured. It was held that the defendants were not responsible for the negligence of C. The defendant employed somebody to do what might be done in a proper and safe manner. It was done negligently and improperly, and the plaintiff was injured, but it was not thus done by the defendants, nor at their instance, and they were not held responsible. So in the case at bar, the negligent or tortious acts of the sub-contractors or of their servants were not the acts of the defendants, and if not their acts, nor done by their procurement, the sub-contractors, or the servants committing them, alone are liable.

In conformity with these views are the decisions in this country. In Blake v. Ferris, 5 N. Y. 48, it was held that the defendants, who had a license from the city of New York to construct at their own expense a sewer in a public street, and who had engaged another person to do it by contract, to construct it at a stipulated price for the whole work, were not liable to third persons for any injury resulting from the negligent manner in which the sewer was left at night by the workmen engaged in its construction. The doctrine there held was, that the immediate employer of the servant, whose negligence occasions the injury, is alone responsible for the negligence of such servant. These views were affirmed in Pack v. Mayor, etc., of New York, 8 N. Y. 222. In Kelly v. Mayor, etc., of New York, 11 *id.* 432, the corporation of the city of New York had ordered a street to be graded, and contracted with a person to do the grading. It was held that they were not liable for damages occasioned by the negligence of the person who had contracted to do this work, or of the laborers in his employ. In Clark v. Vermont and Canada R. R. Co., 28 Vt. 103, and in Pawlet v. The Rutland and

Washington R. R. Co., 28 *id.* 297, it was held that the defendants were not liable for the negligent or tortious acts of the servants of those who had contracted to do certain work for these corporations; that no privity existed between such servants and the corporations. "Though it may be assumed in the case before us," remarks Bennet, J., in the last-named case, "that a public nuisance had been committed by the servants of the sub-contractor, and a particular injury has resulted therefrom to Phelps, and for which the town (of Pawlet) had been compelled to make satisfaction, yet we cannot discover any privity existing between the defendants and the employes of the sub-contractor. The contract made for the building of the abutments to the bridge was for a lawful purpose, and in no way involved the commission of a wrong, and the employes of the sub-contractor were not the servants of the defendants nor under their control." In Cuff v. Newark and New York R. R. Co., 9 Am. Law Reg. N. S. 541, the question under discussion was very carefully considered and examined by the supreme court of New Jersey, and with like conclusions. "The rule is now firmly established," remarked Depue, J., "that when the owner of lands undertakes to do a work which, in the ordinary mode of doing it is a nuisance, he is liable for any injuries which may result from it to third persons, though the work is done by the contractor exercising an independent employment and employing his own servants. But when the work is not in itself a nuisance, and the injury results from the negligence of such contractor or his servants in the execution of it, the contractor alone is liable, unless the owner is in default in employing an improper and unskilful person as the contractor."

In Callahan v. Burlington & Missouri River R. R. Co., 23 Iowa 562, the plaintiff sought to recover compensation for damage done to his timber, and by a fire negligently set by the employe of a sub-contractor with the defendant corporation, for the purpose of clearing the way of trees, logs, brush and rubbish. The contract provided that the way should be cleared of all trees, etc., by removal or burning, as the engineer should direct, before the grading should be commenced. The engineer ordered the burning, which by the negligence of the person who set the fire, escaped on the plaintiff's land, doing there much injury, and the question presented was whether the railroad corporation was responsible for the negligence of a servant of a sub-contractor. In delivering the opinion of the court, Beck, J., says: "If the person sought to be charged under the rule as employer did not contract with the party committing the wrongful act for his labor or services, and is not directly liable to him for compensation for such labor or services, and has no such control over him as will enable the employe to direct the manner of performing the labor or services, he is not liable for the wrongful act of the agent or servant. In order to create the liability, it is especially necessary that the control of the employe over

Washington R. R. Co., 28 Md. 430, it was held that the defendants were not liable for the negligence of [illegible] the servants of those who had contracted to do certain work for those corporations; that no privity existed between [illegible] and the corporations. "Though it may be [illegible] to do our duty as," remarks Bruce, J., in the last-named case, "there is nothing oursence had been committed by the servants [illegible] and a particular injury has resulted there[illegible] for which the town of Pawlet had been [illegible] action, yet we cannot discover on [illegible] principle that the defendants and the employes of the sub-contractor [illegible] the building of the abutments to the bridge [illegible] purpose, and in no way involved the [illegible] the employes of the sub-contractor were not the [illegible] defendants nor under their control." In Cook [illegible] York R. R. Co., 9 Am. Law Reg. N. S. [illegible] decision was very carefully considered and [illegible] the supreme court of New Jersey, and with like [illegible] "is now firmly established" remarked Depue, J., "that [illegible] of lands undertakes to do a work which in the ordinary mode of doing it is a nuisance, he is liable for any injury resulting from it to third persons, though the work be done by [illegible] exercising an independent employment [illegible] such contracts. But when the work is not in itself [illegible] injurious results from the negligence of such contractor in the execution of it, the contractor alone is [illegible] default in employing an improper and [illegible] contractor."

In Callanan [illegible] Missouri River R. R. Co., 23 Iowa, 562, the plaintiff [illegible] recover compensation for damage done to his [illegible] negligence set by the employ of a sub-contractor with [illegible] corporation, for the purpose of clearing the way of [illegible] and rubbish. The contract provided that the way should [illegible] all trees, etc., by removal or burning, as the engineer should direct, before the grading should be commenced. The contractor ordered the burning, which by the negligence of the [illegible] was set the fire, escaped on the plaintiff's land, doing [illegible] such injury, and the question presented was whether the [illegible] corporation was responsible for the negligence of a servant of a sub-contractor. In delivering the opinion of the court [illegible] says: "If the person sought to be charged comes [illegible] rule as [illegible] did not contract with the party commencing the wrongful act, but his labor or services, and is not directly liable to him for compensation for such labor or services, and has no such control over [illegible] will enable the employer to direct the manner of performing the [illegible] or services, he is not liable for the wrongful act of the agent or servant. In order to create the liability, it is especially necessary that the control of the employe over

the servant should be of such a character as to enable him to direct the manner of performing the services, and to prescribe what particular acts shall be done in order to accomplish the acts intended."

The same views have received the sanction of the highest judicial tribunals in Ireland. In Gilbert v. Halpin, 3 Irish Jurist, N. S. 300, the plaintiff, as owner of the schooner Paddy, brought an action against the defendant as secretary to the commissioners empowered to improve the harbor of Wicklaw, to recover damages for its loss by reason of the negligence of commissioners, who had caused to be placed certain piles, etc., and neglected to place, or cause to be placed, any light, or to use any other reasonable precaution to guard vessels from being driven thereon.

The defendants pleaded, among other pleas, that they committed the execution of the work to their contractor, John Killien, and that at the time, etc., the said piles were still in the possession and under the control of the said Killien.

GREEN, B., in delivering his opinion, says: "I think the case falls within the rule that the contractor, and not the employee, ought to be liable."

"There is a plain difference," remarks Richards, B., "between the case of master and servant, and that of employee and contractor. The employee was authorized to perform the work, and he authorized the contractor. No man would drive down piles in a navigable river, without being authorized. Therefore, I think it was the contractor's duty to have apprised his employer that this work had come to such a stage that it was necessary to get lights to prevent accidents. It was not to be expected that the commissioners would be on the ground on all occasions to see what might be required to guard against danger. The contractor failed in performing his duty, and I think he ought to be liable." "The question," says Pennefather, B., "is, who is liable. If the contractor, the commissioners are not liable, for it is clear, from all the cases, that if the contractor is liable the employee is not. It appears to me, that if it was the duty of the contractor to put these lights, his employees were not bound." "The principle of law is clear," remarks Pigot, C. B., "that when a person is engaged by contract to do a certain work, the contractor and not the employee is liable for this."

Such, too, is held to be the law in Scotland. In McLean v. Russell, McNee & Co., 9th March, 1850, 22 Jur. 394, it was decided that when a person contracts with one man to do a piece of work, and the latter sub-contracts with another, the sub-contractor alone is liable for any damage committed in the course of the work by him." This view of the law was again sustained by the same court in Shield v. Edinburgh & Glasgow Railway Co., 28 Jur. 539.

The plaintiff, in support of this suit, relies upon the case of Bush v. Steinman, 1 B. & P. 400; the case was this: A having a house by

the roadside, contracted with B to repair for a stipulated sum; B contracted with C to do the work; C with D to furnish the materials; the servant of D brought a quantity of lime to the house, and placed in the road, by which the plaintiff's carriage was overturned. Held, that A was answerable for the damage sustained. Without particularly examining the reasoning of the court, it is sufficient to say that it has been long since overruled in England and in this country, as will abundantly appear by the cases cited. It is true the case is cited with approbation in Lowell v. Boston & Maine Railroad, 23 Pick. 24, but subsequently, upon an elaborate and careful review of the authorities, it was overruled in Hilliard v. Richardson, 3 Gray, 349. It can no longer be deemed an authority on the other side of the Atlantic.

The next case cited in support of this claim is Lowell v. B. & M. R. R., 23 Pick. 24, but so far as that rests upon Bush v. Steinman, as has already been seen, it has been overruled. "The accident" in that case, observes Thomas, J., in Hilliard v. Richardson, "occurred from the negligence of a servant of the railroad corporation, acting under their express orders. The case, then, of Lowell v. Boston & Lowell Railroad stands perfectly well upon its own principles, and is clearly distinguishable from the case at bar. The court might well say, that the fact of Noonan, being a contractor for this section, did not relieve the corporation from the duties or responsibility imposed on them by their charter and the law, especially as the failure to replace the barriers was the act of their immediate servant, acting under their orders." The defendants in the present case would be liable for any and all wrongful acts done by their "immediate servants, acting under their orders." They should not be held responsible for the torts of a contractor engaged to do a specified work, lawful in itself, which might be performed without interfering with the rights of others, nor for the torts of his servants, whom they never employed, over whom they had no control, and whom they could not discharge.

In Wyman v. Penobscot & Kennebec R. R. Co., 46 Me. 162, the train by which the injury was caused was "run under the direction of the company and under their control," and it was, consequently, held liable. In Veazie v. Penobscot R. R., 49 Me. 119, the plaintiff town sought to recover of the defendant corporation the amount it had been compelled to pay in consequence of a defect in a highway occasioned by their neglect. The injury, it is stated in Phillips v. Veazie, 40 Me. 98, was occasioned "by the acts of the Penobscot Railroad Company, in constructing their road over that of the defendants." The decision in Veazie v. Penobscot Railroad Co., is placed on the ground that the work causing the injury was done "according to the plans and directions of the chief engineer of said company." It is undoubtedly true, that when the contractor is to follow the directions of an engineer of the contracting corpora-

tion, and he is directed by such engineer to do an unauthorized and illegal act, the corporation, thus acting by its agent, would be held liable. But if the engineer gives no such directions, and the tortious acts of the contractor or of his servants are of his or their mere motion, and without such direction or authority, it is difficult to perceive why a railroad corporation, in such case, should be held any more liable for such torts of a contractor than an individual, or a city, or any corporation. If the contract is a legal one, the acts contracted to be done are legal, the wrongful acts of the contractor are his own, and not those of the party with whom the contract is made. It is different when the relation of master and servant exists.

The case, therefore, of Veazie v. Penobscot Railroad Co. is in accordance with all the authorities, if these wrongful or negligent acts were done by the specific direction of their engineer.

The other ground upon which the decision is placed, that "the company must be responsible, whatever contracts they may make," for the torts of those with whom they contract, can hardly be sustained to such an extent. The authorities already cited abundantly show that for the neglects and torts of contractors or their servants, railroad corporations are not to be governed by other or different rules than those applicable to other corporations or to individuals.

The fact that it is specified in the original contract with Pierce & Blaisdell that "the work shall be constructed under the general supervision of the chief engineer of said company, as required by this contract and specifications," does not necessarily render the defendant corporation liable for whatever the contractor or their servants may wrongfully do. The corporation is not to be held for an illegal act not contracted to be done, nor directed by their engineer, and in no way sanctioned by corporate action. In Steel v. The Southeastern Railway Co., 81 E. C. L. 550, the work was to be done by the contractor according to plans prepared by and under the superintendence of the company's surveyor, yet the railway company was held not responsible for an injury resulting to a third person, from the negligent manner in which the work was done by such contractor. It was not caused by the company or by any servant in their employ. In Kelly v. Mayor, etc., of New York, 11 N. Y. 435, the work was to be done, "under the direction and to the entire satisfaction of the commissioner of repairs and supplies, and the surveyor having charge of the work," yet the city was held not responsible for damages caused by the negligence of workmen in the employ of the city. "The clause in question," observes Selden, J., "clearly gave the corporation no power to control the contractor in the choice of his servant. That he might make his own selection will not be denied. The right of selection lies at the foundation of the responsibility of a master or principal for the acts of his servant or agent." To the same effect was the cases of Pack v. Mayor, etc., of New

York, 4 Seld. 222; Cuff v. N. & N. Y. R. R. Co., 9 Am. Law Register 541. In Hobbett v. The London & N. W. Ry. Co., 4 Exch. 253, the company by their contract reserved to themselves the power of dismissing any of the contractor's workmen for incompetence. "Our attention," observes Rolfe, B., "was directed, during the argument, to the provisions of the contract, whereby the defendants had the power of insisting on the removal of careless or incompetent workmen, and so it was contended they must be responsible for their non-removal. But the power of removal does not seem to vary the case. The workman is still the servant of the contractor only, and the fact that the defendant might have insisted on his removal if they thought him careless or unskilful, did not make him their servant."

Though a person employing a contractor is not responsible for the negligence or misconduct of the contractor or his servants in executing the act, yet if the act is wrongful, the employer is responsible for the wrong so done by the contractor or his servants, and is liable to third persons for damages sustained by such wrongdoing. Ellis v. Sheffield Gas Consumer Co., 75 E. C. L. 767. So if, in the present case, the contract was to do a wrongful act, the defendants must be held liable for damages occasioned thereby. Or, if the defendant's engineer directed the contractors to do what was illegal and unauthorized, as by working outside of the limits of the true location, the defendants must be held liable for any trespass thus committed.

By R. S. 1857, Ch. 51, § 23, "Legal and sufficient fences are to be made on each side of land taken for a railroad, when it passes through enclosed or improved land or wood-lots belonging to a farm before the construction of the road is commenced, and they are to be maintained and kept in repair by the corporation. For any neglect of it during the construction of the road, and for injuries thereby occasioned by its servants, agents or contractors, the directors are jointly and severally, personally liable."

By section 25, "the corporation is liable for trespasses and injuries to lands and buildings adjoining, or in the vicinity of its road, committed by a person in its employ, or occasioned by its order, when the party injured has, within sixty days thereafter given notice of it to the corporation; but its liability does not extend to acts of wilful and malicious trespass.

An individual in the employ of the company is not a person contracting with the company to do and perform a certain contract. The difference between the contractor and servant, or employee of the company, is recognized by the statute. The provisions of section 25 apply only to those in the employ of the corporation, or those acting under its orders.

The provisions of § 23 embrace contractors. As contractors are included in one section, and omitted in the other, we must deem

is to have been for some purpose, and that when that has existed it will not be necessary for the agent to be called.

We must, therefore, find the expression as not to the past, regardless under the section for the sake of convenience the service and not contractors.

The remainder of the counsel is devoted to the question of the admission, or not, the agent was been made aware of the facts, and to determine this question the case has to be [illegible]

Section 3.—Notice to and Knowledge of Agent

CHARLTON v. THE MUTUAL ACCIDENT ASSOCIATION

(1892. Supreme Court of South Carolina. 19 S. C. 271.)

[illegible] Though in some of its features, there are slight differences between the case presented by this appeal and that considered when a new trial was awarded on the [illegible] of September term, 1892 (19 S. C. 256), the main questions involved in the same. Under the guise of a second appeal, the defendant company moves that this court shall review and overrule its former decision [illegible] a rehearing. There is no [illegible] of the law as to such, in all of its applications, [illegible]

it to have been for some purpose, and that when they are omitted, it was not the intention of the legislature that they should be included.

We think, therefore, that the corporation is not to be held responsible under this section for the torts of contractors or the servants of contractors.

(The remainder of the opinion is devoted entirely to the question as to whether, in fact, the road had been built outside of the location, and to determine this question the case was ordered to stand for trial.)[1]

Section 3.—Notice to and Knowledge of Agent.

FOLLETTE v. THE MUTUAL ACCIDENT ASSOCIATION.

1892. Supreme Court of North Carolina. 110 N. C. 377.

Avery, J.—Though, in some of its features, there are slight differences between the case presented by this appeal and that considered when a new trial was awarded to the plaintiff at September term, 1890 (107 N. C. 240), the main question involved is the same. Under the guise of a second appeal, the defendant company insists that this court shall review and overrule its former decision, as if it were a rehearing. There is no branch of the law as to which, in all of its ramfications, there is so much conflict in the rulings of

[1] See Farmer v. Kearney (La.), 39 So. 967, discussed in 19 Harv. Law Rev. 540.

"The distinction on which all the cases turn is this: If the person employed to do the work carries on an independent employment and acts in pursuance of a contract with his employer by which he has agreed to do the work on certain specified terms, in a particular manner and for a stipulated price, then the employer is not liable. The relation of master and servant does not subsist between the parties, but only that of contractor and contractee. The power of directing and controlling the work is parted with by the employer and given to the contractor. But, on the other hand, if work is done under a general employment, and is to be performed for a reasonable compensation or for a stipulated price, the employer remains liable, because he retains the right and power of directing and controlling the time and manner of executing the work, or of refraining from doing it, if he deems it necessary or expedient." Bigelow, C. J., in Brackett v. Lubke, 4 Allen (Mass.) 138, 140.

"The inability of the master to shift the responsibility connected with the custody of dangerous instruments, employed in his business, from himself to his servants entrusted with their use, is analogous to, and may be said to rest upon the same principle as that which disenables him from shifting to an independent contractor liability for negligence in the performance of work which necessarily tends to expose others to danger, unless the work is carefully guarded. It seems by the great weight of authority and reason that this cannot be done." Minshall, C. J., in Railway v. Shields, 47 Ohio St. 387, 393.

the various courts of appeal, and so great a diversity of opinion amongst respectable text-writers, as that governing the rights and liabilities of insurers.

When the universal custom was that the underwriter sat in his city office and issued policies of insurance, relying solely upon the representations of the applicant for information, whether as to his own physical state or as to the value, condition and surroundings of his buildings, the insurer would have dealt at a great disadvantage with the unreliable class of his customers, if a contract procured by false representations had not been declared fraudulent and void, or if the disregard of stipulations intended to insure the observance of ordinary care in the habits of a person, or the use of a building, had not been held sufficient to defeat a recovery upon the death of the person or the destruction of the property insured. But when, in the new order of things, the active competition between companies brought to every man's door a soliciting agent, furnished with instruction and advised as to his duty by the best trained business men and ablest lawyers in the country, the shrewdest and most unscrupulous of applicants could hope to get no advantage, and the untrained or uneducated among the number labored under a decided disadvantage in answering questions, not always comprehended in all of their bearings and in receiving subsequently from its chief office, in a distant city, the contract of the company, limiting its own liability and imposing new duties upon the insured by means of conditions never heard of before the issuing of the policy, and often never read, or imperfectly understood afterwards. *Ubi eadam ratio, ibi idem jus.* When custom reverses the position of the parties, it would be strange if the law should undergo no modification.

The local agent of the defendant company testified that, with a knowledge of the deafness of the plaintiff, he filled out his application for an accident policy, signed his own name on the back of it, and forwarded it to the principal office in New York. The policy came in due course of time and was delivered to the plaintiff, who paid all of the premiums assessed against him, until he was so seriously wounded in his arm by the accidental discharge of a gun, in the hands of a friend, as to make amputation necessary. The company took a receipt by way of compromise, which, under the findings of the jury, is not evidence of payment, and, as there was no exception to the rulings or charge involving the question of payment or satisfaction, we are brought to the consideration of the leading point. In the application for membership is the following paragraph:

"I have never had, nor am I subject to, fits, disorders of the brain, * * * or any bodily or mental infirmity, except had an attack of rheumatism six years ago."

The defendant now contends that the representation by the plaintiff that he was free from bodily infirmity was false and

fraudulent, and constituted a material inducement to the defendant to issue the policy. Ordinarily, the defendant could avoid the performance of the contract by showing the falsity of a material statement in the application. But the plaintiff, where representations contained in the application are admitted to be untrue, may rebut the presumption of fraudulent intent arising from such admission by showing that the local agent of the company, with full knowledge of the falsity of the statement, entered the answers of the insured and forwarded the application, approved by his own endorsement. We cannot give the sanction of this court to the doctrine that a local agent may scream into the ear of a deaf person solicitations to apply for an accident policy, write for him an answer, which he knows at the time to be untrue, to a question in the application, procure the policy, receive the premiums as they fall due, and when the insured becomes prostrate from a wound, stand aside at the bidding of the principal and allow it, with the premiums in its coffers, to avoid the contract on account of a statement known by the agent to be false when he prepared it for the applicant's signature. The reason which induced the courts to guard the underwriter against misrepresentations as to facts within the peculiar or exclusive knowledge of applicants no longer exists, when the agent of the insurer, on the ground, has as full knowledge of the truth or falsity of an application prepared by him as has the insured. *Cessante ratione, cessat et ipsa lex.* Where the local agent of a company has actual knowledge of the falsity of an answer to a question in the application which he writes for the insured, the knowledge of the agent will be imputed to the company, and it will not be allowed to avoid the contract on the ground of false warranty. 1 Am. & Eng. Ency., 333; 1 May on Ins., §§ 140-143; 2 *id.*, §§ 497-501; Dupree v. Ins. Co., 92 N. C. 417; *id.*, 93 N. C. 240; Hornthal v. Ins. Co., 88 N. C. 73; Fishbeck v. Ins. Co., 54 Cal. 422; Eggleston v. Ins. Co., 65 Iowa 308; Ins. Co. v. Fish, 71 Ill. 620; Mullen v. Ins. Co., 58 Vt. 113; Shaffer v. Ins. Co., 53 Wis. 361; Ins. Co. v. McCrea, 8 Lea (Tenn.) 513.

It is not material whether we say that the conduct of the local agent amounts to a waiver or works an estoppel on the insurer, as the authorities are in conflict upon the point. 1 May, *supra*, No. 143; 2 *id.* No. 498. Certain, it is, that in such cases the knowledge of the agent is imputed to the principal and "to deliver a policy with a full knowledge of facts, upon which its validity may be disputed, and then insist upon those facts as a ground of avoidance, is to attempt a fraud." 2 May *supra*, No. 497. The agent necessarily discovered, while negotiating with the plaintiff, that the latter was deaf; and it would be as unreasonable to presume that both the agent and the applicant intended to affirm that to be true which they knew to be false, as that such a patent defect as the loss of an eye in a horse did not exist. Leslie v. Ins. Co., 5 T. & C. (N. Y.),

193; Ins. Co. v. Mahone, 21 Wallace 152; Brown v. Gray, 6 Jo. 103; Fields v. Rouse, 3 Jones 72.

We do not propose to go behind the verdict and the instruction upon which it was founded, and avoid the reaffirmation of the principles announced on the former hearing of this case by determining what is a bodily infirmity, since, conceding deafness to come under such designation, we think that there was no error in the rulings of the court below. As already intimated, it is immaterial whether we declare that the agent by his conduct waived objection to the inaccurate statement, or that by writing it down, or having full knowledge of the real truth of the matter, his conduct operated to estop the company, since, in view of what occurred, when the application was made out, and before, the avoidance of liability under the contract, because of the infirmity known by the agent to exist, would be fraudulent and unjust. There is no error.

Affirmed.[1]

ROSS AND WAITE, EXECUTORS, v. HOUSTON AND CANNON.

1853. HIGH COURT OF ERRORS AND APPEALS OF MISSISSIPPI.
25 Miss. 591.

MR. JUSTICE YERGER delivered the opinion of the court.

James C. Alderson, by his agent, George West, became the purchaser at a sale made by virtue of an execution against Nathaniel Anderson of a tract of land. This land he afterwards sold to the defendant, Houston, by a quitclaim deed, Houston being informed of the manner in which Alderson acquired his title. The defendants,

[1] See The Distilled Spirits, 11 Wall. (U. S.) 356.

It was held in Brown v. Columbus, 75 Atl. 917, that one who purchases realty through an agent will be charged with the knowledge of the agent regarding the condition of the title.

In Jackson Co. v. Schmid, 124 S. W. 1074, a statute provided that any dramshop keeper selling liquor to any habitual drunkard after receiving notice from the wife of the drunkard not to sell, must forfeit a certain sum of money to the wife. It was held that notice given by the wife to the agent of a dramshop keeper makes the latter liable under this statute.

The agent's knowledge of the vicious character of domestic animals is sufficient to make the owner liable for injuries caused by the animals. Lynch v. Kineth, 36 Wash. 368.

In Neal v. Hardware Co., 122 N. Car. 104, the court said that the principal is bound by knowledge of facts which the agent could have known by the use of ordinary care.

"The notice to the agent, to operate as constructive notice to the principal, must be such as would reasonably charge the agent, on failure to repeat, with breach of faith and duty to his employer, and therefore the law will, under such circumstances only, presume he has communicated his knowledge to his principal." Ray, J., in Day v. Wamsley, 33 Ind. 145, 147.

[illegible]; [illegible] v. Mallory, [illegible]; Brown v. Gray, 6 [illegible]; Field v. [illegible].

We do not propose to go behind the verdict and the instruction upon which it was returned, nor to enter into a consideration of the principle announced on the former hearing of this case in determining what is a bodily infirmity [illegible] sufficient seriousness to come under such designation, [illegible] there was no error in the rulings of the court below. [illegible], it is immaterial whether we declare that the agent [illegible] without avowed intention to the inaccurate statement [illegible] writing it down, or having full knowledge of [illegible] the policy, his conduct operated to cause the company [illegible] of what occurred when the application was made [illegible] the avoidance of liability under the contract because of the [illegible] known by the agent to exist, would be fraudulent and unjust. There is no error.

Affirmed.

[illegible] v. HOUSTON AND CANNON.

[illegible] Court of Errors and Appeals of Mississippi. 13 Miss. 591.

Mr. Justice [illegible] delivered the opinion of the court.

James C. [illegible] by his agent, George West, became the purchaser at a sale [illegible] of an execution against Nathaniel Anderson of a [illegible] land. This land he afterwards sold to the defendant Houston [illegible] deed, Houston being informed of the manner in which [illegible] acquired his title. The defendant

[1] See The Distilled Spirits, 11 Wall. (U. S.) 356.

It was held in [illegible], 75 Ark. 507, that one who purchases realty through an agent [illegible] charged with the knowledge of the agent respecting the condition of [illegible].

In [illegible] W. 1052, a statute provided that any [illegible] keeper [illegible] to any habitual drunkard after receiving notice [illegible] forfeit [illegible] sum of [illegible] by the wife to the keeper [illegible] under this statute.

The agent's knowledge [illegible] domestic animals is sufficient to make the principal liable for damages caused by the animals. [illegible]

In [illegible] the court said that the principal is bound by knowledge of those facts the agent could have known by the use of ordinary care.

"The rule is that the [illegible] communicate to the principal, must be such as would [illegible] the agent [illegible] breach of trust [illegible] and therefore the law will, under such circumstances only, presume [illegible] communicated his knowledge to his principal." [illegible]

who are sued upon a writing obligatory given for the purchase-money, resist payment upon the ground that they were deceived and defrauded by Alderson in the sale of the land, while they admit that Alderson only sold by a quitclaim deed, and that they knew he had obtained title to the land by virtue of an execution sale of it, as the property of Nathaniel Anderson; and that they took upon themselves the risk of the validity and legality of the execution, and the sale under it, so far as the proceedings connected with the sale disclosed upon their face the facts of the case; yet they say, that the sale under the execution to Alderson was fraudulent and void, which fact was known to Alderson, but concealed by him from them. It appears from the pleadings and proof, that when the sale under the execution against Anderson was made, he was not the owner of the land, but had previously sold and conveyed it by deed to A. F. Hopkins & Co. It also appears, that West, the agent by whom Alderson purchased the land, had notice when he made the purchase for Alderson that Anderson did not own the land, and that he had no interest in it. But it does not appear, that Alderson knew these facts when he sold to Houston; or that West, the agent, by whom he purchased, ever communicated to him the knowledge he had received on the subject; or that notice had ever been given to him at any time, that Anderson did not own the land, and that it belonged to A. F. Hopkins & Co.

On this state of facts, it is contended by Houston and Cannon, that although Alderson did not have notice in fact, the notice given to West, the agent, was notice in law to Alderson of the title of Hopkins & Co.; and though he did not actually know, when he sold to the defendant, that the land belonged to Hopkins & Co., yet, as the agent through whom he became the owner of the land did know this fact, the law will charge him with knowledge of all the facts of which his agent had notice.

It is certainly true as a principle of law, founded upon reason and sound policy, that wherever a party purchases property through the agency of another, notice, communicated to that agent during the progress of that negotiation, of the rights of third parties to the property, will be held, in any controversy with such third parties in relation to it, as equivalent to direct notice to the principal. 2 Sugd. on Vend. 215.

So, too, notice given to an agent employed to purchase property of any defect in the title or quality of the property, will be equivalent to notice of those facts to the principal, in any controversy that may arise between him and the vendor in relation to the property.

We think it may also be fairly deduced from the adjudged cases, and from principle, that if a party employ an agent to sell property, and notice be given to that agent of such defects in the title or quality of the estate, which if known to the principal, it would have been his duty to disclose to the purchaser, it would be the duty of

the agent also to disclose them to the purchaser; and in the event of his failure to do so, that the purchaser might be relieved from the contract in the same manner and to the same extent, that he would have been relieved, if the principal had known the facts, and made the sale without disclosing them; and this, too, although the principal, when his agent made the sale, was ignorant of the defects, the title, or quality of the estate. This is certainly as far as any adjudged case, or any sound legal principle, would warrant the court in extending this doctrine of implied notice.

But the case before us does not fall within the operation of either of the foregoing rules. On the contrary, the attempt is now made to extend the doctrine still further, and we are asked to declare not only, that notice given to an agent to buy property shall effect the conscience of the principal in every matter touching the purchase of the property, and the title thereby acquired, so far as the rights of third parties exist in relation to the property, but also that knowledge of defects in the title or quality of the estate thus possessed by an agent employed to purchase, shall be considered in law as made known, though in fact they were not made known, to the principal, so as to affect his conscience in any future sale he might make of the property.

We do not believe either the law or sound policy will warrant such an extension of the rule.

So far as the rule has heretofore been established, that notice to the agent shall be treated as notice to the principal, we are willing to enforce it, as a rule of sound policy, although in individual cases it may sometimes operate harshly. But we are not willing to extend it further than it has heretofore been carried; and we are, therefore, of opinion, that if Alderson, at the time he sold to Houston, did not know in fact that he had acquired no title to the land by the purchase under the execution sale against Anderson, because the land belonged to A. F. Hopkins & Co., and not to Anderson; the notice of those facts given to West, the agent, by whom he purchased the land, will not be treated as implied notice, so as to affect his conscience in the subsequent sale made by him of the property, and thereby entitle the purchaser to insist upon an avoidance of his contract.

As the circuit judge laid down the law differently, we must reverse the judgment, and remand the cause.[1]

[1] Compare Sec. Nat. Bk. v. Curren, 36 Ia. 535.

BOUSFIELD v. GRAND NATIONAL INSURANCE ASSOCIATION

1896. Statement Case of Defendants. 30 Jan. 96. [illegible]

Interrogs. 3.—This action was commenced to recover from the defendants a sum of money alleged to have been received by the defendants to the use of the plaintiff on a policy of insurance effected by the defendants with the plaintiff on the life of one [illegible] for the sum of £500 on the [illegible] day of [illegible] 1895. That such a contract was entered into, that it was signed and sealed by the defendants, and that the consideration money [illegible] duly paid, were admitted by the defendants. That the assured is [illegible] dead, and that no claim has been made by the plaintiff for the amount of the policy, were also admitted by the defendants. That the assured is [illegible] dead, and that no claim has been made by the plaintiff for the amount of the policy, were also admitted by the defendants. That the assured is [illegible] dead, and that no claim has been made by the plaintiff for the amount of the policy, were also admitted by the defendants.

The plaintiff's claim is based upon the following facts: That the assured, [illegible], was a member of the defendant association, and that he had effected the policy in question with the defendants. That the assured died on the [illegible] day of [illegible] 1895, and that the plaintiff, as the assured's widow, was entitled to the amount of the policy. That the plaintiff had duly made a claim for the amount of the policy, and that the defendants had refused to pay the same. That the plaintiff had duly made a claim for the amount of the policy, and that the defendants had refused to pay the same.

The defendants' case is as follows: That the assured, [illegible], was a member of the defendant association, and that he had effected the policy in question with the defendants. That the assured died on the [illegible] day of [illegible] 1895, and that the plaintiff, as the assured's widow, was entitled to the amount of the policy. That the plaintiff had duly made a claim for the amount of the policy, and that the defendants had refused to pay the same. That the plaintiff had duly made a claim for the amount of the policy, and that the defendants had refused to pay the same.

The defendants' case is as follows: That the assured, [illegible], was a member of the defendant association, and that he had effected the policy in question with the defendants. That the assured died on the [illegible] day of [illegible] 1895, and that the plaintiff, as the assured's widow, was entitled to the amount of the policy. That the plaintiff had duly made a claim for the amount of the policy, and that the defendants had refused to pay the same. That the plaintiff had duly made a claim for the amount of the policy, and that the defendants had refused to pay the same.

HOUSEMAN v. GIRARD MUTUAL BUILDING AND LOAN ASSOCIATION.

1876. Supreme Court of Pennsylvania. 81 Pa. St. 256.

Sharswood, J.—This was an action instituted in the court below by the defendants in error to recover from the plaintiff in error, who was formerly recorded of deeds for the county of Philadelphia, damages for a false certificate of search issued by him, or by his authority. That such a certificate was issued false in fact; that it was ordered and paid for by the defendants, and that in consequence they suffered damages, were points not in dispute. That the recorder is *prima facie* liable to respond in damages for such false search, has been settled in McCaraher v. Commonwealth, 5 W. & S. 21, and is no longer an open question.

It was decided by the present chief justice at *nisi prius,* in Commonwealth v. Kellogg, 6 Phila. R. 90, that this liability is to the party who asks and pays for the search, and does not extend to his assigns or alienee.

The contention here all grows out of the fact that the search in this case, by the request of the conveyancer of the defendants, was ordered and paid for by the owner of the premises, in order that he might obtain a loan of money on mortgage from the defendants, and the certificate was so used, and the money so obtained.

It is urged, that by the employment of the owner as the agent for this purpose, the defendants are affected with this knowledge of the existence of the mortgage, which was omitted in the certificate. This is a very familiar principle and well settled. But it is equally well settled that the principal is only to be affected by knowledge acquired in the course of the business in which the agent was employed. This limitation of the rule is perfectly well established by our own cases, and it is not necessary to look further: Hood v. Fahnestock, 8 Watts 489; Bracken v. Miller, 4 W. & S. 110; Martin v. Jackson, 3 Casey 508. It is a mistake to suppose that it depends upon the reason that no man can be supposed to always carry in his mind a recollection of former occurrences, and that if it be proved that he actually had it in his mind at the time, the rule is different. It may support the reasonableness of the rule to consider that the memory of men is fallible in the very best, and varies in different men. But the true reason of the limitation is a technical one, that it is only during the agency that the agent represents, and stands in the shoes of his principal. Notice to him is then notice to his principal. Notice to him twenty-four hours before the relation commenced is no more notice than twenty-four hours after it had ceased would be. Knowledge can be no better than direct actual notice. It was incumbent on the plaintiff to show that the knowledge of the

agent, to use the accurate language of one of our cases, "was gained in the transaction in which he was employed." There was not only no evidence of this offer by the plaintiff, but it was plain that it had been gained before, and in an entirely different transaction. It is not necessary to consider in this view of the matter whether the alleged agent was really such, or only the servant or clerk of the conveyancer.

It is urged that the conveyancer of the defendants, in the employment of the owner, who was the applicant for the loan, and interested, therefore, to obtain clear searches, was guilty of negligence, which is imputable to his constituents, and will, therefore, bar their recovery. But this is to maintain that a man is to presume fraud or forgery in one, whose character is good, and that if he does not he is *prima facie* negligent. When the scrivener received a clear certificate under the undoubted official seal of the recorder, he surely was not bound to presume that a fraud had been committed on the recorder or his clerk, nor was there any evidence from which such fraud could be inferred. If there was no such presumption, neither would there arise any presumption beforehand, that the owner would succeed in corrupting or deceiving the clerk or servant of the plaintiff. Without some such presumption, how can it be said that it was *prima facie* evidence of negligence? that the owner was employed in the mere ministerial service of ordinary paying for and procuring the certificate?

We are of opinion that the learned judge was right in directing a verdict for the plaintiffs below.

Judgment affirmed.[1]

FAIRFIELD SAVINGS BANK v. CHASE.

1881. Supreme Judicial Court of Maine. 72 Me. 226.

Writ of entry to recover possession of a certain parcel of land, described in a mortgage from John W. Chase to the plaintiff corporation, dated the tenth day of March, 1876, and duly recorded on that day. The defendant seasonably disclaimed as to one undivided half of the demanded premises, but claimed title to the other undivided half. The plea was the general issue as to the undivided half claimed by the defendant. The defendant based his claim to one undivided half upon a deed from John W. Chase to him, dated the eighth day of March, 1876, but not recorded till the twenty-eighth day of March, 1876.

The attorney who wrote and took the acknowledgment of both

[1] *Accord:* Bessemer, etc., Co. v. Jenkins, 111 Ala. 135.

the deed and the mortgage, was at that time a trustee of the plaintiff corporation. It was not claimed at the trial that any other officer of the bank had any knowledge of the existence of the deed to the defendant, at the time of the execution or recording of said mortgage.

The court, for the purpose of settling a question of fact, ruled, *pro forma,* that if the attorney, at the time of the execution of the mortgage, had knowledge that the deed had been executed and delivered by John W. Chase to the defendant, this would be sufficient notice to the plaintiff corporation to overcome the legal effect of the fact that the mortgage was recorded before the deed, and that, if the jury should find that the attorney had such knowledge, they should return a verdict for the defendant. The jury, under this instruction, returned a verdict for the defendant.

To the foregoing instructions the plaintiff excepted.

PETERS, J.—A notice to a bank director or trustee, or knowledge obtained by him, while not engaged either officially or as an agent or attorney in the business of the bank, is inoperative as a notice to the bank. If otherwise, corporations would incur the same liability for the unofficial acts of directors that partnerships do for the acts of partners; and corporate business would be subjected oftentimes to extraordinary confusion and hazards. Carry the proposition, that notice to a director is notice to the bank, to its logical sequence, and a corporation might be made responsible for all the frauds and all the negligences, pertaining to its business, of any and all its directors not officially employed. Any one director would have as much power as all the directors. A single trustee or director has no power to act for the institution that creates his office, except in conjunction with others. It is the board of directors only that can act. If the board of directors or trustees makes a director or any person its officer or agent to act for it, then such officer or agent has the same power to act, within the authority delegated to him, that the board itself has. His authority is in such case the authority of the board. Notice to such officer or agent or attorney, who is at the time acting for the corporation in the matter in question, and within the range of his authority or supervision, is notice to the corporation. Abbott's Trial Ev. 45, and cases in note; Fulton Bank v. Canal Co., 4 Paige 127; La Farge Fire Ins. Co. v. Bell, 22 Barb. 54; National Bank v. Norton, 1 Hill (N. Y.) 578; Bank of U. S. v. Davis, 2 Hill (N. Y.) 454; North River Bank v. Aymar, 3 Hill (N. Y.) 263; Ins. Co. v. Ins Co., 10 Md. 517; Bank v. Payne, 25 Conn. 444; Farrell Foundry v. Dart, 26 Conn. 376; Smith v. South Royalton Bank, 32 Vt. 341; Washington Bank v. Lewis, 22 Pick. 24; Commercial Bank v. Cunningham, 24 Pick. 270; Housatonic Bank v. Martin, 1 Met. 308; 1 Pars. Com. *77; Story Agen., § 140; South. Law Rev. N. S. vol. 6, p. 45; Hoover v. Wise, 91 U. S. 308. Another question arises in the case before us. It appears that Brown's knowl-

edge of a previous conveyance was acquired anterior to his employment by the bank, if employed by the bank at all, and not during or in the course of his employment on their account. The question is, whether a principal is bound by knowledge or notice which his agent had previous to his employment in the service of the principal.

Upon this question the authorities disagree. The negative of the question has been uniformly maintained in Pennsylvania and some other of the states. In the late case of Houseman v. The Building Association, 81 Penn. St. 256, it was said, that "notice to an agent twenty-four hours before the relation commenced is no more notice than twenty-four hours after it has ceased would be." But we think, all things considered, the safer and better rule to be that the knowledge of an agent, obtained prior to his employment as agent, will be an implied or imputed notice to the principal, under certain limitations and conditions, which are these: The knowledge must be present to the mind of the agent when acting for the principal, so fully in his mind that it could not have been at the time forgotten by him; the knowledge or notice must be of a matter so material to the transaction as to make it the agent's duty to communicate the fact to his principal; and the agent must himself have no personal interest in the matter which would lead him to conceal his knowledge from his principal, but must be at liberty to communicate it. Additional modification might be required in some cases.

These elements appearing, it seems just to say that a previous notice to an agent is present notice to the principal. The presumption, that an agent will do what it is his right and duty to do, having no personal motive or interest to do the contrary, is so strong that the law does not allow it to be denied. There may be instances where the rule operates harshly; but, under the rule reversed, many frauds could be easily perpetrated. Of course, the knowledge must be that of a person who is executing some agency, and not acting merely in some ministerial capacity, as servant or clerk. For instance, if in the present case Brown had merely taken the acknowledgment of the deed to the bank, or had transcribed the deed as a clerk or copyist, such acts would not have imposed a duty to impart his knowledge to the bank. But if employed to obtain the title for the bank by a deed to be drawn by him for the purpose, that would place the transaction within the rule. Jones Mort. (2nd ed.), § 587. Notice of the existence of an unrecorded mortgage upon the property to an officer employed to make an attachment, is notice to the plaintiff. Tucker v. Tilton, 55 N. H. 223. In the case before us, Brown, it is claimed by the defendant, was employed by the bank to make an instrument to convey a title from a person to the bank. Brown knew that such person had not the title. It would be his duty to so inform his client. He would be likely to do so. He had no motive not to do it. The law conclusively presumes that he did inform him. We think such a case comes reasonably within the rule,

though it is not so marked a case as it would be if Brown had been employed by the bank to ascertain if the grantor had the title, and if he had them to make the deed.

The general rule or principle touching this case, guarded by the cautions and conditions stated, is supported by the later English cases, although the earlier English cases went the other way; is also the law of the United States supreme court; and is, we think, sustained by a preponderance of opinion in the state courts where the question has been discussed. Fuller v. Bennett, 2 Hare 394; Dresser v. Norwood, 17 C. B. (N. S.) 466; Rolland v. Hart, L. R. 6 Ch. App. 687; The Distilled Spirits, 11 Wall. 356; Hovey v. Blanchard, 13 N. H. 148; Hart v. The Bank, 33 Vt. 252; Suit v. Woodhall, 113 Mass. 391; National Bank v. Cushman, 121 Mass. 490; Anketel v. Converse, 17 Ohio St. 11; Hoppock v. Johnson, 14 Wis. 303; Lawrence v. Tucker, 7 Maine 195; Jones Mort. (2nd ed.), § 584, and following sections and notes. Many other cases, on both sides the questions, will be found cited and reviewed in a learned article in the Amer. Law. Reg. (Phila.) New Series, vol. 16, p. 1.

An application of this rule to the facts of this case, requires the verdict to be set aside. S. S. Brown, while a trustee of the Fairfield Savings Bank, had actual knowledge that John W. Chase had deeded certain land to Isaac Chase. Knowing that fact, he as an attorney wrote and took the acknowledgment of a mortgage of the same land from John W. Chase to the bank, and the mortgage was recorded first. The question was whether the bank had knowledge of the prior deed when the mortgage was taken. The *pro forma* ruling that the knowledge of Brown was sufficient notice to the bank to overcome the legal effect of the fact that the mortgage was recorded before the deed, irrespective of the further question whether Brown was, at the time of making the mortgage, acting as an attorney in the business and employment of the bank or not, was erroneous. It is contended that the evidence shows that Brown was acting for the bank. But the fact being at least questionable, it should have been passed upon by the jury.

Exceptions sustained.[1]

[1] *Accord:* Constant v. University of Rochester, 111 N. Y. 604; Brothers v. Bank of Kaukauna, 84 Wis. 381; Snyder v. Partridge, 138 Ill. 173, 184.

JENKINS BROS. SHOE CO. v. RENFROW & CO.

1909. Supreme Court of North Carolina. 151 N. C. 323.

Appeal from Webb, J., May term, 1909, of Forsyth.

The plaintiff corporation sued the defendants, as partners, to recover an amount due it for goods sold and delivered. The defendant T. J. Renfrow alone answered and contested the plaintiff's right to recover against him. The plaintiff, in its complaint, alleged "that on 27, May, 1907, it sold and delivered to the defendants a lot of shoes, of the value," etc. The contesting defendant denied his liability, on the ground that the partnership between him and his co-defendant had been dissolved on March 28, 1907, and notice of dissolution had been published in a newspaper published in Wilkesboro, N. C., where the partnership did business, the plaintiff doing business in Winston-Salem, and that notice of such dis solution had been given to W. N. Horn, the traveling salesman of plaintiff, its agent who had taken the order sued upon and all other orders from defendant for plaintiff. It was admitted by the defendant that the partnership existed up to March 28, 1907, and was formed in 1904; that his co-partner, G. V. Renfrow, his son, had the entire management of the business and did all its buying and selling; that he lived in Mecklenburg county; that when the partnership was dissolved he took from his co-partner his note, secured by a mortgage on certain described lands in Mecklenburg county. The plaintiff offered evidence of the continued advertisement in the paper stated by G. V. Renfrow & Co. for some months after the alleged dissolution, and denied it had any notice of the dissolution at the date mentioned in the complaint. It further appeared in evidence that the salesman of the plaintiff, Horn, took the order from G. V. Renfrow on April 4, 1907, but it was subject to acceptance by the plaintiff. The plaintiff's salesman admitted he received notice of the dissolution before May 15; that it was within his duty to notify plaintiff when he received notice of dissolution of partnerships who were dealing with it, and he sometimes received money from customers when they offered it. It was in evidence that the agent, Horn, was notified on April 4 of the dissolution, but this was denied by him. His Honor charged the jury that unless the notice of dissolution was given to the agent, Horn, on or before April 4, no subsequent notice would avail the defendant. The defendant excepted. The jury answered the issue of indebtedness in favor of the plaintiff. From the judgment rendered upon the verdict the defendant T. J. Renfrow appealed to this court.

Manning, J.—After stating the case: If Horn was such an agent of the plaintiff that notice to him would be imputed to the plaintiff, then we think His Honor was in error in restricting the time at which the notice of the dissolution should have been given, in order

JENKINS BROS. SHOE CO. v. RENFROW & CO.

(1900. Supreme Court of North Carolina. 123 N. C. 323.

Appeal from Superior Court, Mecklenburg county; O. H. Guion, Judge.

The plaintiff corporation brought suit against the defendant T. J. Renfrow, as partner, to recover an amount [illegible] sold and delivered. The defendant T. J. Renfrow [illegible] and answered the plaintiff's right to recover [illegible] plaintiff, in its complaint, alleged "that on [illegible] sold and delivered to the defendant [illegible] of boots and shoes." The contesting defendant denied the [illegible] the partnership between him and the [illegible] on March 28, 1897, and notice [illegible] was published in a newspaper published in Mecklenburg county, the [illegible] membership and business, the plaintiff [illegible] action, and that notice of such dissolution [illegible] that the traveling salesman of [illegible] the store and upon and all other [illegible] account. It was admitted by the defendant [illegible] up to March 28, 1897, and was [illegible] manager, G. V. Renfrow, his son, had [illegible] business and for all its buying and [illegible] Mecklenburg county, that when the partnership [illegible] his partner his note, secured by [illegible] lands in Mecklenburg county. The [illegible] continued advertisement in the paper [illegible] by G. V. Renfrow for several months after the alleged dissolution, [illegible] any notice of the dissolution of the [illegible] It having appeared in evidence that the defendant [illegible], Horn, took the order from G. V. Renfrow on April 3 [illegible] was subject to acceptance by the plaintiff. The plaintiff [illegible] admitted he received notice of the dissolution before [illegible] that it was within his duty to notify plaintiff upon [illegible] a dissolution of partnerships who were dealing [illegible] communities received money from customers when [illegible] was in evidence that the agent, Horn, had notice [illegible] of the dissolution, but this was denied by him. The [illegible] the jury that unless the notice of dissolution was given [illegible] Horn, on or before April 4, no [illegible] notice [illegible] the defendant. The defendant excepted. The jury [illegible] of indebtedness in favor of the plaintiff. From the judgment rendered upon the verdict the defendant T. J. Renfrow appealed to this court.

Marshall, J. [illegible] If Horn was such an agent of the plaintiff [illegible] to be imputed to the plaintiff, then it [illegible] the [illegible] in restricting the time at which the notice of the dissolution should have been given, in order

to be binding upon his principal, the plaintiff, to the date "on or before April 4." While the order for the goods sued for was taken by Horn on April 4, it was made by Horn subject to the acceptance of the plaintiff. The acceptance of the order was signified by the shipment of the goods on May 27, and in no other way. The complaint alleged both sale and delivery on that day, and in our consideration of this appeal we must consider the plaintiff concluded by this allegation of his pleading. This allegation was distinctly presented to His Honor by the defendant, and instructions asked and refused. The agent admitted he had notice of the withdrawal of the defendant T. J. Renfrow from the partnership before May 15, and that he was then the agent of the plaintiff, with the same scope and extent of authority as theretofore.

In Mechem on Agency, § 721, the learned author deduces the following rule from the authorities: "The law imputes to the principal and charges him with all notice or knowledge relating to the subject-matter of the agency which the agent acquires or obtains while acting as such agent and within the scope of his authority or which he may previously have acquired, and which he then had in mind, or which he had acquired so recently as to reasonably warrant the assumption that he still retained it. Provided, however, that such notice or knowledge will not be imputed (1) where it is such as it is the agent's duty not to disclose, and (2) where the agent's relation to the subject-matter or his previous conduct render it certain that he will not disclose it, and (3) where the person claiming the benefit of the notice, or those whom he represents, colluded with the agent to cheat or defraud the principal." There is no evidence in this case bringing it within any of the exceptions named in the proviso of the above rule. This court, in Straus v. Sparrow, 148 N. C. 309, quotes with approval this principle, as stated in Cox v. Pearce, 112 N. Y. 637; 3 L. R. A., p. 563: "1. The failure of an agent to communicate to his principal information acquired by him in the course and within the scope of his agency is a breach of duty to his principal; but as notice to the principal it has the same effect as to third persons as though his duty had been faithfully performed." Mfg. Co. v. Rutherford, 64 S. E. 444.

If, therefore, Horn was such an agent that notice to him was notice to his principal, the plaintiff, then, under the above authorities, it must follow that the plaintiff had notice of the withdrawal of the defendant T. J. Renfrow from the firm, and its dissolution before May 15—between May 6 and 15, as fixed by Horn. No credit had then been extended for the goods ordered on April 4. In Bisban v. Boyd, 4 Paige's Chan. 16, it is held: "If he (a former customer) was informed of the dissolution of the partnership immediately after the sale and while the goods remained in his own hands, undelivered, a court of equity would never permit him to re-

cover for those goods against the former partners of the vendee." Notice of the dissolution is a rescission of the order. Goodspeed v. Plow Co., 45 Mich. 522. The correctness of these doctrines cannot be controverted. It cannot be consistent with any just conception of fair dealing to subject a retired partner to the payment of debts contracted after notice of dissolution of the partnership has been given to the creditor extending the credit. Such a creditor cannot assume the status of partnership to be unchanged when he has actual notice of a change imputed to him from the knowledge of his agent. Was Horn such an agent that notice to him was notice to his principal? The evidence offered at the trial tends to show that Horn was a traveling salesman of the plaintiff, and defendants made all their purchases, extending over several months, from plaintiff through Horn; that he was the sole representative of plaintiff in the section in which defendants did business, and visited their place of business nearly every thirty days; that he reported to plaintiff references given by new customers; that he reported dissolutions of partnerships with whom plaintiff was dealing, and sometimes received payments for bills due, when offered him by merchants, but that he was not instructed to collect bills; that he in a general way inquired about the condition of the business of those with whom he was dealing for plaintiff.

In Cowan v. Roberts, 133 N. C. 629, this court held: "The notice should have been given to the plaintiffs or to some one of their employees who had charge of the credit department. The 'man,' the defendant, Redmond, found 'working on the books' may have had no duties connected with any department of the business, except to keep an account of the cash, so far as we know. Of course, if any salesman had been notified of the dissolution of the firm, and that salesman had afterward sold goods to Roberts, Redmond would not have been liable." In reviewing this decision in Straus v. Sparrow, 148 N. C. 309, Hoke, J., speaking for this court, said: "The decision, while eminently sound in principle, goes very far, certainly on the facts of that particular case, in upholding a demand against a retired partner." A careful consideration of Cowan v. Roberts, *supra,* does not convince us that that decision militates against our holding that the evidence was sufficient to support a finding that Horn was a competent agent to receive notice, and that notice to him was notice to the plaintiff, his principal. Horn was, by his course of dealing and the scope and extent of his power, the medium of negotiations between plaintiff and defendant partnership. The learned judge who tried this case seemed to be of this opinion, but erroneously, as we think, in view of the distinct allegation of the complaint, restricted the binding effect upon the plaintiff of the notice to him to the date of the order. The case has been made complicated and the decision more difficult by the variance between the proof and the allegation in apparently treating

April 4 is the day of the accepted order and the question the proposition to buy because a contract of purchase and sale. We have not passed upon the other exceptions taken, as they will not be presented at the next trial. The decision pointed out would be a New trial.

FIRST NATIONAL BANK OF HIGHTSTOWN v. CHRISTOPHER

(1878. Supreme Court of New Jersey. 40 N. J. L. 435.

DEPUE, J.—The plaintiffs sued the defendant on a promissory note for the sum of $3,000, dated January 30, 1877, and payable three months after date, to the order of J. M. Stovel, and indorsed by Stovel, and by M. & J. S. Perrine. The note was discounted by the bank on the 9th of January, 1877, and before maturity; and the proceeds of the discount placed to the credit of the firm of M. & J. S. Perrine.

The plaintiffs having rested, the defendant proposed to prove that the note was fraudulently obtained, and was without consideration. The court regarding the bank as a *bona fide* holder for full value, before maturity, overruled the offerings, and directed a verdict for the plaintiffs.

The question discussed here was the correctness of this ruling.

The evidence offered was to show that the note was procured by the forgery of the indorsement of the firm of M. & J. S. Perrine, in settlement of a judgment duly held against one Wilkin.

Matthias Perrine was one of the indorsers of the firm of M. & J. S. Perrine, and also one of the nine directors of the bank. He had notice on the 4th of January that the note was obtained by fraud, as it was discounted by the bank on the 9th. No other knowledge of the circumstances of the consideration of the note was possessed by any director or officer of the bank. Perrine did not communicate the information to the president, cashier or any of the directors at the board meetings. The defendant contends that notice to Perrine was notice to the bank, and that therefore the bank took the paper with notice, to wit, a holder *with fraud*.

The general rule is that notice to an agent is notice to the principal. This general rule is not denied. The powers of the president and directors of a corporation are by statute for the purpose of exercising control.

The directors of a corporation are not individually agents for the transaction of its ordinary business, which is usually delegated to executive officers, such as the president or cashier. Directors

April 4 as the day of the accepted order and the day when the proposition to buy became a contract of purchase and sale. We have not passed upon the other exceptions taken, as they may not be presented at the next trial. For the error pointed out, there must be a New trial.

FIRST NATIONAL BANK OF HIGHTSTOWN v. CHRISTOPHER.

1878. Supreme Court of New Jersey. 40 N. J. L. 435.

Depue, J.—The plaintiffs sued the defendant on a note made by him for the sum of $349,68, dated January 3d, 1877, and payable three months after date, to the order of J. M. Scovel, and endorsed by Scovel, and by M. & J. S. Perrine. The note was discounted by the bank on the 9th of January, 1877, and before maturity; and the proceeds of the discount placed to the credit of the firm of M. & J. S. Perrine.

The plaintiffs having rested, the defendant proposed to prove that the note was fraudulently obtained, and was without consideration. The court regarding the bank as a *bona fide* holder for full value before maturity, overruled the defense, and directed a verdict for the plaintiffs.

The question discussed here was the correctness of this ruling.

The evidence offered was to show that the note was procured by the fraud of the attorney of the firm of M. & J. S. Perrine, in settlement of a judgment they held against one Wilkin.

Matthew Perrine was one of the members of the firm of M. & J. S. Perrine, and also one of the nine directors of the bank. He had notice on the 4th of January that the note was obtained by fraud, as is was discounted by the bank on the 9th. No other knowledge of the infirmity of the consideration of the note was possessed by any director or officer of the bank. Perrine did not communicate the information to the president, cashier or any of his associates in the directorship. The defendant contends that notice to Perrine was notice to the bank, and that therefore the bank took the paper with notice, or was a holder *mala fide*.

The general rule is that notice to an agent is notice to his principal. This general rule is not denied. The inquiry is under what circumstances directors of a corporation are its agents for the purpose of receiving notice.

The directors of a corporation are not individually its agents for the transaction of its ordinary business, which is usually delegated to its executive officers, such as the president or cashier. Directors

are possessed of extensive powers, even to the extent of absolute control over the management of its affairs, but these powers reside in them as a board; and, when acting as a board, they are collectively the representatives of the corporation. Notice to directors when assembled as a board would undoubtedly be notice to the corporation. Under what conditions knowledge acquired by a director in other than his official capacity will be constructive notice to the corporation, and be binding on it, is not entirely settled in the cases. A distinction has been taken between knowledge of illegality or want of consideration of a note, by a director who acts with the board in discounting it, and such knowledge on the part of a director who is not present and acting with the board when the discount is made. In the former case it had been held that the bank is bound by his knowledge; in the latter it is not. Bank of the U. S. v. Davis, 2 Hill 451; North River Bank v. Aymar, 3 Hill 262; National Security Bank v. Cushman, 121 Mass. 490; Farmers, etc., Bank v. Payne, 25 Conn. 444; Farrell Foundry v. Dart, 26 Conn. 376; National Bank v. Norton, 1 Hill 572; Washington Bank v. Lewis, 22 Pick. 24; The President, etc., v. Cornen, 37 N. Y. 320; 2 Leading Cas. in Eq. 171, note to Le Neve v. Le Neve. This distinction has been criticized and condemned by Justice Story as sapping "the foundations on which the security of all banking and other moneyed corporations has been supposed to rest, to wit, that no act or representation or knowledge of any agent thereof, unless officially done, made or acquired, is to be deemed the act, representation or knowledge of the corporation itself." Story on Agency, § 140, b. It will not be necessary to consider the soundness of this distinction, for it is admitted that Perrine's knowledge of the infirmity in the consideration of this note was acquired when he was acting in his private capacity; and the opening of counsel did not propose to show that he was present at the bank when the note was discounted, and participated as a director in the act of discount.

Perrine simply occupied a twofold relation. He was a member of the firm of M. & J. S. Perrine, and a director in the bank. In the absence of evidence that he acted in the capacity of a director in the discount of the note, the counsel must take their stand on the broad ground that in point of law the bank was chargeable, in virtue of his directorship, with knowledge of the private affairs of the firm. This position is obviously untenable. Powles v. Page, 3 C. B. 16. As a member of the firm and a director of the bank, Perrine was in the same position as a common director in two companies. Speaking on this subject, Mellish, L. J., says: "I cannot think that, because he was a common director to the two companies, we are on that account to say that the one company has necessarily notice of everything that is within the knowledge of the common director, and which knowledge he has acquired as director of the other company. It appears to me that a director is simply a person appointed to act

as one of a board, with power to bind the company when acting as a board, but having otherwise no power to bind them." Mellish, L. J., characterizes the proposition that where a director of a bank is taking a loan for himself it should be imposed on the banking company that they have knowledge of his own private affairs, as unreasonable. *In re Marseilles Railway Co.*, L. R. 7 Ch. App. 161. The cases in the same effect are numerous and harmonious as to the text and notes of Mr. Chitty's treatise. Chitty's Index, page 429, *et seq.*

The counsel sought further to make the case by the proof that Perrine owed a duty to the bank, as a director, to communicate the information he had with respect to the note, and that the presenting the note to be protested for dishonor without such communication was fraudulent. They cited, in support of their contention, Bank of Rome v. N. Y. and Sharon Canal Co., 4 Paige 248. In that case Cheesebrough was a director of the canal company, one of the finance committee, and also president of the bank. As president of the bank he knew that the funds in question were deposited in the bank to the credit of the canal company. They were drawn from the bank by Brown, on his checks as president of the canal company, and were for private purposes. The chancellor held that if Cheesebrough knew the purpose of Brown in making the drafts, it was his duty to communicate the facts to the other officers of the bank or to the board of directors, and that if he neglected to do so, the bank was liable for his fraud. Cheesebrough, as president of the bank, knew the funds had been deposited in the bank to the credit of the canal company; and if he knew that it was malfeasance in Brown to appropriate the money to his individual use it was misfeasance in him, as an officer of the bank, not to communicate the fact. The case decided nothing more than the well settled principle that a corporation is liable for the fraud of its servants within their authority, and in the due course of the business, and cannot discharge itself from responsibility by showing that the agent also failed in his duty to the corporation. It is decided nothing more, for case is careful to recite all the authorities, and reviews the leading cases which have been regarded as well settled, viz. of misfeasance within the private knowledge of a director in connection with the business of a corporation, whenever it is his duty expressly enjoined, to communicate that information to his associates. So justice cannot practically be restricted within any boundaries of knowing the corporation in all cases where a director has such private knowledge, though he may do no official act to which such information relates. See Story on Agency, § 140b. The case does not sustain the defense. The fraud of Perrine in that way was fraud in the transaction was committed by him in the course of the business of the bank and for the benefit of the firm exclusively. If he was not restricted to the bank in the conduct on his part in his dealings, a director

as one of a board, with power to bind the company when acting as a board, but having otherwise no power to bind them." And James, L. J., characterizes the proposition that where a director of a bank is asking a loan for himself, it should be imputed to the banking company that they have knowledge of his own private affairs, as most unreasonable. *In re* Marseilles Railway Co., L. R. 7 Ch. Appeals 161. The cases to the same effect are collected and commented on in the text and notes of Mr. Green's edition of Brice's Ultra Vires, page 424, *et seq.*

The counsel sought further to place this case on the ground that Perrine owed a duty to the bank, as a director, to communicate the information he had with respect to the note, and that his permitting the note to be presented for discount without such communication was fraudulent. They cited, in support of their contention, Fulton Bank v. N. Y. and Sharon Canal Co., 4 Paige 127. In that case, Cheeseborough was a director of the canal company, and one of the finance committee, and also president of the bank. As president of the bank he knew that the funds in question were deposited in the bank to the credit of the canal company. They were drawn from the bank by Brown, on his checks as president of the canal company, and used for private purposes. The chancellor held that if Cheeseborough knew the purpose of Brown in making the drafts, it was his duty to communicate the facts to the other officers of the bank or to the board of directors, and that if he neglected to do so, the bank was liable for his fraud. Cheeseborough, as president of the bank, knew the funds had been deposited in the bank to the credit of the canal company; and if he knew that it was mediated by Brown to appropriate the money to his individual use, it was incumbent on him, as an officer of the bank, not to aid in the misappropriation. The case decided nothing more than the well-settled doctrine that a corporation is liable for the fraud of its agents acting within their authority, and in the due course of its business, and cannot shield itself from responsibility by showing that the agent also failed in his duty to the corporation. If it decided anything more, the case is directly in conflict with all the authorities, and contrary to legal principles which have been regarded as well settled; for if information within the private knowledge of a director is constructively notice to a corporation whenever it is his duty, abstractly considered, to communicate that information to his associates, the doctrine cannot practically be restricted within any bounds short of binding the corporation in all cases where a director has such private knowledge, though he may do no official act to which such information relates. See Story on Agency, § 1406. The case cited will not aid the defense. The fraud of Perrine, if there was any fraud in the transaction, was committed by him in the course of the business of the firm, and for the benefit of the firm exclusively. If any loss had resulted to the bank from neglect on his part in his duties as director,

he might have been held liable for the consequences as between him and the bank. Stewart v. Lehigh Valley R. R., 9 Vroom 505, 523. A corporation is liable for the fraud of its agents in transacting its business, but no case that has come under my observation has affirmed that it is also liable for the individual frauds of its agents done by them individually, and for their individual benefit exclusively.

In negotiating the note with the bank, Perrine was dealing with it in his own interest, and must be regarded as a stranger to the company. Stratton v. Allen, 1 C. E. Green 229. The question how far the knowledge of an officer of a corporation, which he acquired outside of the business of the company, and which was not, in fact, communicated to the corporation, is binding upon it, when it relates to dealings between the officer and the corporation, was considered by the chancellor in Barnes v. Trenton Gas Light Co., 12 C. E. Green 33. The bill was filed to set aside a conveyance made by executors in fraud of the powers contained in the will. The conveyance was made to Mr. Potts, who was the legal adviser of the executors, and also president of the gas light company. Potts conveyed directly to the company, and the bill charged notice on the defendants solely on the ground that at the time of the conveyance to the company Mr. Potts was its president. On demurrer, it was held that the information which came to Mr. Potts' knowledge, as counsel of the executors, was not constructively notice to the corporation, and that the company was a *bona fide* purchaser without notice.

The defense proposed was properly overruled, and the rule to show cause should be discharged.[1]

THE MERCHANTS' NATIONAL BANK OF KANSAS CITY v. LOVITT.

1892. Supreme Court of Missouri. 114 Mo. 519.

Black, P. J.—This is an action on a negotiable promissory note for $2,900, executed by the defendant Lovitt and payable to O. P. Dickinson in four months after date, with interest from date at the

[1] See Pennoyer v. Willis, 26 Ore. 1.

"Where a bank has several agents, to whom separate and independent duties are intrusted, notice to one of them, in regard to a matter not pertaining to his duties, cannot affect the bank." Clayton, J., in Goodloe v. Godley, 13 Sm. & M. (Miss.) 233, 238.

A statement by the maker of a note to the president of a bank that the note was procured by fraud will not be binding upon the bank, although it subsequently discounts the note, when the statement was not made to the president in his official capacity, and was not made at the bank nor with reference to the bank's business. Washington Bk. v. Pierce, 6 Wash. 491.

rate of eight per cent. per annum, and by Dickinson indorsed and delivered to the plaintiff bank. The defense set up by Lovett, the maker of the note, is a failure of consideration.

The history of the transaction is this: On the twenty-second of January, 1888, Dickinson, the payee of the note in suit, by an agreement in writing sold to Lovett fifty shares of stock in a corporation then about to be formed for which Lovett gave his note of even date for $2,000 due in six months. It was understood between Lovett and Dickinson, before this note became due, that it was to be renewed. On July 11, 1888, Lovett executed the note sued upon, bearing date the twenty-seventh of that month, and gave it for the purpose of renewal of the former one, and Dickinson indorsed it in the name of the same day. Lovett paid the interest accrued on the original note.

For the purpose of the trial only, it was agreed "that the note in suit was given for a contract in which the payee of the note agreed to sell certain shares of stock which then had no existence, and the issue of same when the corporation was formed and stock certificates issued; that the corporation never was formed and the stock certificates never issued, and that there was a complete failure of consideration of the note, that said Dickinson, the payee of the note, before made the contract set forth in defendant's answer, at all times then and after the making of the same up to the present time knew of its existence and terms."

W. B. Clark was president, Mr. Messenger cashier, and Dickinson vice-president of the plaintiff bank when the bank acquired the note sued upon. They were all active officers, and Dickinson was also a director. Dickinson had a conversation with Clark, the president, in which he said he had or expected to get the note of Lovett. He then asked Clark whether the bank would take it and Clark agreed to discount the note. The evidence leaves it in some uncertainty that conversation occurred after, or a day or two before the note in suit was executed; but it clearly appears that Clark in pursuance agreed to take the note. The note was executed on the twenty-seventh of July, and on that day Dickinson indorsed and delivered it to the bank. He at the same time figured up the discount on a deposit slip and handed the slip to the discount clerk or to the teller, who passed it to the clerk. The discount clerk made the proper entries, placing the amount of the note less $10.50 to the credit of Dickinson, who checked out and used the money. Lovett was a well-known customer of the bank, and had a line of credit there.

Dickinson in his evidence says he did not accept the note for the stock, but that Clark did. Clark testified that in speaking with Dickinson as to taking the note for the bank, but that he was to be allowed to do [illegible] that is to say, to make the usual deduction for the paper and discount the proper amount of interest for the time. The $10.50 deducted represented the interest from the twenty-seventh of July to the twenty-seventh, the latter being the [illegible] note.

he might have been held liable for [illegible] between him and the bank. Stewart v. Lehigh [illegible] 6, 9 Wheat. 505, 523. A corporation is liable [illegible] frauds in transacting its business, but no case has [illegible] any observation has affirmed that it is [illegible] fraudulent frauds of its agents done by them individually [illegible] individual benefit exclusively).

In negotiating [illegible] Perrine was dealing with it in his own [illegible] as a stranger to the company. Stratton v. [illegible] 256. The question how far the knowledge of [illegible] which he acquired outside of the [illegible] and which was not, in fact, communicated to the [illegible] binding upon it, when it relates to declared [illegible] the corporation, was considered by the [illegible] Trenton Car Light Co., 12 C. E. Green 33. The [illegible] set aside a conveyance made by [illegible] which remained in the will. The conveyance was made [illegible] was the legal owner of the executors, and also [illegible] as joint tenants. Potts conveyed [illegible] The bill charged notice on the defendant [illegible] the line of the conveyance to the [illegible] Demurrer, it was held [illegible] Mr. Potts' knowledge, as constructively notice to the corporation, [illegible] *bona fide* purchaser without notice.

The [illegible] properly overruled, and the rule to [illegible]

THE [illegible] AL BANK OF KANSAS CITY [illegible] T.

[illegible] Missouri. 114 Mo. 519.

[illegible] P. [illegible] on a negotiable promissory note for $2,000, executed by the [illegible] Levitt and payable to O. P. Tuckerman at their [illegible] with interest from date at the

[illegible]

[illegible] a bank [illegible] and collateral [illegible] regard to a matter not pertaining [illegible] Jersey, cited [illegible] Green J., in Craddock v. Hadley, 13 Ga. S. C. (1866) 224.

A [illegible] by the [illegible] president of a bank that the note was procured by fraud [illegible] from the bank, although it subsequently [illegible] was not made to the president [illegible] Weeks on

rate of eight per cent. per annum, and by Dickinson endorsed and delivered to the plaintiff bank. The defense set up by Lovitt, the maker of the note, is a failure of consideration.

The history of the transaction is this: On the twenty-seventh of January, 1888, Dickinson, the payee of the note in suit, by an agreement in writing sold to Lovitt fifty-five shares of stock in a corporation then about to be formed for which Lovitt gave his note of that date for $2,900 due in six months. It was understood between Lovitt and Dickinson before this note became due that it was to be renewed. On July 11, 1888, Lovitt executed the note sued upon, dating it the twenty-seventh of that month, and gave it to Dickinson in renewal of the former one, and Dickinson endorsed it to the bank on the same day. Lovett paid the interest accrued on the original note.

For the purpose of the trial only, it was agreed "that the note sued upon was given for a contract in which the payee of the note agreed to sell certain shares of stock which then had no existence and deliver the same when the corporation was formed and stock certificates issued; that the corporation never was formed and the stock certificates never issued, and that there was a complete failure of consideration of the note; that said Dickinson, the payee of the note, having made the contract set forth in defendant's answer, at all times from and after the making of the same up to the present time knew of its existence and terms."

W. B. Clark was president, Mr. McKnight cashier, and Dickinson vice-president of the plaintiff bank when the bank acquired the note sued upon. They were all active officers, and Dickinson was also a director. Dickinson had a conversation with Clark, the president, in which he said he had or expected to get the note of Lovitt. He then asked Clark whether the bank would take it, and Clark agreed to discount the note. The evidence leaves it in doubt whether this conversation occurred after, or a day or two before the note in suit was executed; but it clearly appears that Clark as president agreed to take the note. The note was executed on the eleventh of July, and on that day Dickinson endorsed and delivered it to the bank. He at the same time figured up the discount on a deposit slip and handed the slip to the discount clerk or to the cashier, who passed it to the clerk. The discount clerk made the proper entries, placing the amount of the note less $10.30 to the credit of Dickinson, who checked out and used the money. Lovitt was a well-known customer of the bank, and had a line of credit thereat.

Dickinson in his evidence says he did not accept the note for the bank, but that Clark did. Clark testified that he agreed with Dickinson to take the note for the bank, but that he left the details of he arrangement to Dickinson, that is to say, to make the entries, receive the paper and deduct the proper amount of interest for the bank. The $10.30 deducted represented the interest from the eleventh of July to the twenty-seventh, the latter being the post-date of the note.

The officers of the bank, except Dickinson, knew nothing about the contract between Dickinson and defendant, and the bank had nothing whatever to do with the original note.

The defendant asked the court to declare the law to be that the knowledge of the vice-president of the existence and nature of the agreement constituting the consideration of the note in suit was the knowledge of the bank, which request the court refused, and this presents the only question for our consideration.

It is a general rule that notice of a fact acquired by an agent while transacting the business of his principal is notice to the principal, and this rule applies to banking and other corporations as well as to individuals. It is the duty of the agent to communicate to the principal information thus acquired, which would affect the rights of the principal; and the presumption is that the agent has performed his duty in this behalf. If he has not, still the principal should be charged with notice of the existence of such facts thus coming to the knowledge of the agent, because he selects his own agent and confides to him the particular business. Story on Agency, § 140. But the reason of the rule ceases when the agent acts for himself and not his principal, and the rule itself ought not to apply in such a case. Accordingly, it has been held by this court that knowledge of an unrecorded deed acquired by officers of a corporation, while acting for themselves and not for the corporation, will not be imputed to the corporation. Johnston v. Shortridge, 93 Mo. 227.

An officer of a banking corporation has a perfect right to transact his own business at the bank of which he is an officer, and in such a transaction his interest is adverse to the bank, and he represents himself and not the bank. The law is well settled that, when an officer of a corporation is dealing with it in his individual interest, the corporation is not chargeable with his uncommunicated knowledge of facts derogatory to his title to the property which is the subject of the transaction. Taylor on Corporations (2d ed.), § 210; 1 Waterman on Corporations, § 135; Frenkel v. Hudson, 82 Ala. 158; Wickersham v. Zinc Co., 18 Kan. 481; Barnes v. Gas Light Co., 27 N. J. Eq. 33; Innerarity v. Bank, 139 Mass. 332.

In the case last cited the court, after speaking of the general rule that knowledge of the agent will be imputed to the principal, says: "But this principle can have no application where the director of the bank is the party himself contracting with it. In such case the position he assumes conflicts entirely with the idea that he represents the interest of the bank. * * * A director offering a note, of which he is the owner, for discount, or proposing for a loan of money on collateral security alleged to be his own property, stands as a stranger to it."

Now, the facts set up to defeat a recovery here are the facts constituting the transaction between Dickinson and the defendant, in

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NATIONAL LIFE INSURANCE COMPANY OF THE UNITED STATES v. MINOT, administratrix.

(Court of Appeals of New York. 57 N. Y. [12 Sickels] 393.)

Appeal from judgment of the general term of the supreme court, third judicial department, in favor of defendant, upon exceptions ordered denying a motion for a new trial and ordering judgment on a referee's report.

Action by the National Life Insurance Company of the United States against Mary A. Minot, administratrix of Henry [illegible]. From a judgment of the general term of the supreme court, third judicial department, reversing a judgment entered upon the report of a referee, and ordering a new trial, defendant appeals. Reversed.

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which Dickinson did not represent or profess to represent the bank, and with which the bank had nothing whatever to do. Again, Dickinson in offering the note to the bank for discount represented his own personal interest; and Clark, the president, represented the bank. In this particular transaction Dickinson occupied the position of any other customer, and not that of an officer or agent of the bank; and it must follow from the principles of law before stated that the bank is not chargeable with his knowledge of uncommunicated facts affecting his title to the note. But it is said Dickinson fixed and figured out the discount, and hence he did in point of fact represent the bank. The note bore interest at the rate of eight per cent. per annum from date; and it appears Dickinson calculated interest at that rate from the eleventh of July, the date of the transaction, to the twenty-seventh of that month, the date of the note, and deducted as discount $10.30; but it does not appear who designated the amount of discount to be paid. The broad fact remains that the president of the bank agreed to take the note, and that the bank accepted the discount as figured up by Dickinson; and the fact, if such it was, that he may have designated the rate of discount in the first instance is wholly immaterial. He, nevertheless, represented his own interest in the entire transaction. The judgment is affirmed. All concur.[1]

THE NATIONAL LIFE INSURANCE COMPANY OF THE UNITED STATES v. MINCH, ADMINISTRATOR.

1873. COURT OF APPEALS OF NEW YORK. 53 N. Y. 144.

APPEAL from judgment of the general term of the supreme court in the third judicial department, in favor of defendant, entered upon an order denying a motion for a new trial, and directing judgment on a nonsuit.

[1] *Accord:* Seaverns v. Presbyterian Hosp., 173 Ill. 414.
Contra: Henry v. Allen, 28 N. Y. Sup. 242. See criticism of this case in 8 Harv. Law Rev. 229.
"It is sometimes said that it cannot be presumed that an agent will communicate to his principal acts of fraud which he has committed on his own account in transacting the business of his principal, and that the doctrine of imputed knowledge rests upon a presumption that an agent will communicate to his principal whatever he knows concerning the business he is engaged in transacting as agent. It may be doubted whether the rule and the exception rest on any such reasons. It has been suggested that the true reason for the exception is that an independent fraud committed by an agent on his own account is beyond the scope of his employment, and therefore knowledge of it, as matter of law, cannot be imputed to the principal, and the principal cannot be held responsible for it." Field, J., in Allen v. South Boston R. R. Co., 150 Mass. 200, 206.

This action was brought to recover of the defendant, as administrator, etc., of Anna C. Minch, $2,500 and interest, as damages suffered by the plaintiff by reason of a conspiracy and fraudulent representations, whereby the plaintiff was induced to insure the life of the deceased, and to pay the loss after her death. The complaint alleged in substance that about the 17th day of March, 1869, the deceased, being at the time incurably diseased with a cancer, with her husband and Doctor Potter, combined and confederated together to deceive, cheat and defraud the plaintiff out of $2,000 by procuring an insurance upon her life for that amount. That for the purpose they did, orally and in writing, falsely and fraudulently represent to the plaintiff, in applying for a policy of insurance upon her life, that she had not had, and did not then have any serious illness, etc., and that she was then, in all respects, a first-class, healthy risk, and safely insurable. That such representations were false and fraudulent, to the knowledge of the said deceased, her husband and said Potter, and were made with intent to deceive the plaintiff. That plaintiff, its officers and agents, then believed the said representations to be true, relied thereon, and were deceived thereby. That thereupon, in consideration of said representations and of the premium, the plaintiff duly issued its contract or policy of life insurance to the said Anna C. Minch, insuring her life in the sum of $2,000. That after her death (on the 8th of July, 1869), in pursuance of the fraudulent combination and purposes aforesaid, her said husband and said Potter falsely and fraudulently represented to the plaintiff that the cause of her death was pneumonia or inflammation of the lungs, and not any other disease. That the plaintiff, believing these representations to be true, relied thereon and was deceived thereby, and thereupon, after due notice and proof of her death on or about the eleventh day of September, 1869, paid to the defendant, as administrator, etc., the amount insured.

The facts and evidence upon the trial, so far as pertinent to the questions discussed, appear sufficiently in the opinion.

The court nonsuited the plaintiff. Exceptions were ordered to be heard at first instance at general term.

Church, C. J.—I am unable to concur with the ruling of the learned judge at the circuit, which was sustained by a majority of the court at general term, that there was not evidence sufficient to go to the jury to charge fraud or conspiracy upon the deceased in obtaining the policy, a conspiracy was alleged between the deceased, her husband and Doctor Potter, the medical examiner for the plaintiff, to fraudulently obtain a policy of insurance upon the life of Mrs. Minch, knowing that she had, at the time, a cancer, which was an incurable disease. It was not necessary to establish the conspiracy against the three. It was sufficient to establish that the policy was obtained by fraud, for which the deceased was chargeable alone, or

in connection with others, and this might be done by direct evidence, or by circumstances from which a jury could reasonably infer it.

The application contained the questions whether she had had any serious illness, local disease or personal injury, and whether she had then, to the best of her knowledge or belief, any disorder, or any infirmity or weakness tending to impair her constitution, to all of which the answer was in the negative. There was evidence tending to show that she had, at the time, a cancer in her breast which she was aware of, and of which she afterward died. There was conflicting evidence as to the fact of a cancer, and also as to whether the deceased knew it, which should have been submitted to the jury. The fact that she signed the application, that she was examined by Doctor Potter for the purpose of making the medical certificate, her constant communication with her husband, who, with the doctor, was active in making the application and procuring the policy, and other circumstances, were pertinent to go to the jury, upon the question of her knowledge of the general fact that an insurance was being effected upon her life, and, also, of the substance of the application which she had signed. It is true there was evidence tending to show that the application was not, in fact, read over to her, and that she did not know what it contained, but her ignorance of its nature was far from being conclusively proved.

Again, if the husband, as the agent of the wife, procured the policy by fraud, she cannot retain the benefit of it and be relieved from the consequences of the fraudulent means by which it was obtained. It is established that an innocent principal cannot take an advantage resulting from the fraud of an agent, without rendering himself civilly liable to the injured party. (10 N. Y. 34; Graves v. Spier, 58 Barb. 349.) If the husband obtained the policy by a fraud, acting as the agent of his wife, he occupies the position of claiming to keep money, as her legal representative, which he fraudulently obtained as her agent. He is defending this action upon her title to the policy, which, if procured by his fraud, is invalid.

The court also erred in refusing to allow the plaintiff to go to the jury upon the question, and to charge them that if from the evidence they believed it was known by the husband, Doctor Potter and the deceased that she had a cancer, which was incurable, and that there was an understanding between them that they were to obtain an insurance upon her life, at the time knowing she was incurably diseased, the plaintiff was entitled to recover. The defendant was a laborer in a saw-mill. This insurance and another were procured upon the life of his wife, at the suggestion of his employer, whose wife was the certifying friend. The medical examiner was a brother-in-law of the employer, who first applied to the agent about a policy, and accompanied the husband afterward to the agent on the same business, and there is evidence that he procured the signature of

the deceased to the application. He had attended the deceased as a physician, and, it is claimed, treated the disease as a cancer. It is also claimed that the defendant and his wife went to Rome the fall before to consult a cancer doctor under his advice, and there was other evidence proper for the jury tending to show that all those persons supposed and believed that the deceased had a cancer at the time of the policy, and also that she in fact died with that disease about three months afterward. If Doctor Potter, the husband and deceased knew that the latter had an incurable cancer, and acted in concert in procuring the policy, the plaintiffs were entitled to recover. Even if the company would otherwise be chargeable with the knowledge of Doctor Potter as their agent, they would be relieved from it under such circumstances. If a person colludes with an agent to cheat the principal, the latter is not responsible for the acts or knowledge of the agent. The rule which charges the principal with what the agent knows is for the protection of innocent third persons, and not those who use the agent to further their own frauds upon the principal. If Doctor Potter did not know that the cancer existed, and did not collude with the deceased or her husband, as he testified, then he is innocent of any wrong, and the plaintiff is not injured; and if he did, the defendant is not to be injured by his guilty knowledge. It is not intended to intimate an opinion upon the facts or any of them; the evidence was conflicting as to nearly all of them. All that we intend to say is that it was not a case for a nonsuit. It should have been submitted to the jury. The court should not nonsuit a plaintiff except in cases where a verdict would be set aside as against evidence. This is not such a case.[1] * * * The judgment must be reversed and a new trial ordered, costs to abide event.[2]

All concur.

[1] A portion of the opinion is omitted.

[2] "The doctrine of constructive notice, when properly limited, is a useful one, but to apply it to a case where the parties relying on the doctrine are the agents themselves and others who had expressly agreed that the facts in possession of the agents should not be communicated to the principal, would make it an instrument of fraud." Buchanan, J., in Traders', etc., Bk. v. Black, 108 Va. 59, 65.

To same effect see Hickman v. Green, 123 Mo. 165; Cowan v. Curran, 216 Ill. 598.

Section 4.—Declarations and Admissions of Agent.

FAIRLIE v. FASTINGS.

1801. High Court of Chancery. 10 Ves. Jr. 126.

Lord Master of the Rolls (Sir William Grant).—The object of this cause is a loan of money, by the late plaintiff, Alida Fairlie, to the defendant. As it is now by bill in equity the money sent is to be recovered, it is incumbent upon the plaintiff to state, and to prove, some ground for coming into this court for the payment, or the means of obtaining payment of his demand. The question of jurisdiction must depend upon the allegations of the bill, which state that the defendant applied to the plaintiff for the loan of three lacs of rupees upon the security of the defendant's bond; that the plaintiff agreed to advance that sum by instalments; that a bond was executed which it was agreed should remain with Casinto Baboo, an agent of the defendant, until the whole money thereof should be advanced, and then should be delivered to the plaintiff; that the money was advanced, but the plaintiff never received the bond; Casinto Baboo in answer to his repeated applications at length informing him that it had been delivered up to the defendant.

In support of this statement the plaintiff has not read, and could not read any part of the answer. But the plaintiff has gone into evidence of declarations by Golendeo Baboo and Casinto Baboo; and the question is whether those declarations can amount to proof of such facts as are alleged by the bill. Upon that question my opinion is, that these declarations do not come within the principle upon which they are supposed to be admissible. As a general proposition, what one man says, not upon oath, cannot be evidence against another man. The exception must arise out of some connexion of situation coupled with the declarations made by the party. An agent may, undoubtedly, within the scope of his authority, bind his principal by his agreements; and in many cases by his acts. What the agent has said may be what contravenes the agreement of the principal; or the representations or statements made may be the foundation of, or the inducement to, the agreement. Therefore, if evidence is not necessary to law, evidence must be admitted to prove the agent did make that statement or representation. He will regard to what was done, the words, with which those acts are accompanied, frequently tend to determine their quality. The party, therefore, to be bound by the act must be affected by the words. But whether in one or the other of those ways I do not know how what is said by an agent can be evidence against his principal. The mere existence of a fact cannot depend on proof of it; though it may sometimes contribute to the business to affect the person making the assertion with interest. For instance, if it was a matter [illegible]

Section 4.—Declarations and Admissions of Agent.

FAIRLEY v. HASTINGS.

1804. High Court of Chancery. 10 Ves. Jr. 123.

The Master of the Rolls (Sir William Grant).—The subject of this cause is a loan of money by the late plaintiff, Maha Rajah Nobkissen, to the defendant. As it is not by bill in equity that money lent is to be recovered, it is incumbent upon the plaintiff to state, and to prove, some ground for coming into this court for the payment, or the means of obtaining payment of his demand. The question of jurisdiction must depend upon the allegations of the bill; which states that the defendant applied to the plaintiff for the loan of three lacs of rupees upon the security of the defendant's bond; that the plaintiff agreed to advance that sum by instalments; that a bond was executed, which it was agreed should remain with Caunto Baboo, an agent of the defendant, until the whole money should be advanced, and then should be delivered to the plaintiff; that the money was advanced, but the plaintiff never received the bond; Caunto Baboo in answer to his repeated applications at length informing him that it had been delivered up to the defendant.

In support of this statement the plaintiff has not read, and could not read, any part of the answer. But the plaintiff has gone into evidence of declarations by Gobindee Baboo and Caunto Baboo; and the question is whether these declarations can amount to proof of such facts as are alleged by the bill. Upon that question my opinion is, that these declarations do not come within the principle, upon which they are supposed to be admissible. As a general proposition, what one man says, not upon oath, cannot be evidence against another man. The exception must arise out of some peculiarity of situation, coupled with the declarations made by one. An agent may, undoubtedly, within the scope of his authority, bind his principal by his agreement; and in many cases by his acts. What the agent has said may be what constitutes the agreement of the principal; or the representations or statements made may be the foundation of, or the inducement to, the agreement. Therefore, if writing is not necessary by law, evidence must be admitted to prove the agent did make that statement or representation. So, with regard to acts done, the words, with which those acts are accompanied, frequently tend to determine their quality. The party, therefore, to be bound by the act, must be affected by the words. But except in one or the other of those ways I do not know how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot amount to proof of it; though it may have some relation to the business in which the person making that assertion was employed as agent. For instance, if it was a material fact that there

was the bond of the defendant in the hands of Caunto Baboo, that fact would not be proved by the assertion that Gobindee Baboo, supposing him an agent, had said there was; for that is no fact, that is, no part of any agreement which Gobindee Baboo is making, or of any statement he is making as an inducement to an agreement. It is mere narration, communication to the witness in the course of conversation, and therefore could not be evidence of the existence of the fact.

The admission of an agent cannot be assimilated to the admission of the principal. A party is bound by his own admission, and is not permitted to contradict it. But it is impossible to say a man is precluded from questioning or contradicting anything any person has asserted as to him, as to his conduct or his agreement, merely because that person has been an agent of his. If any fact, material to the interest of either party, rests in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion. Lord Kenyon carried this so far as to refuse to permit a letter by an agent to be read to prove an agreement by the principal; holding, that the agent himself must be examined; Maesters v. Abram, 1 Esp. N. P. Cas. 375. If the agreement was contained in the letter, I should have thought it sufficient to have proved that letter was written by the agent; but, if the letter was offered as proof of the contents of a pre-existing agreement, then it was properly rejected. This doctrine was discussed incidentally in Bauerman v. Radenius, 7 T. R. 663; and in that case there is a reference to another, Biggs v. Lawrence, 3 T. R. 454, in which Mr. Justice Buller held that a receipt given by an agent for goods, directed to be delivered to him, might be read in evidence against the principal. The counsel in Bauerman v. Radenius state that the contrary had been frequently since held by Lord Kenyon at *nisi prius,* without its having ever been questioned. That statement does not appear to have been denied upon the other side; and seems to have been acquisced in by Lord Kenyon; who said "that was not the point upon which the case was argued or determined;" meaning the point, that such a receipt could be admitted in evidence.

It will be found, however, that this question can hardly be said to arise in this case; when it is considered what the concern of Caunto Baboo in this transaction was, and what are the facts in proof of which his declaration was offered. Caunto Baboo is stated to have been in the employment of the defendant. One of the witnesses says he had the general management of his pecuniary concerns. But of this particular transaction he does not appear, either by the bill or the witness, to have had the management. Upon the whole of the statement and evidence it does not appear that Caunto Baboo was concerned in the negotiation of the loan; that he was employed as the agent for this purpose. The statement of the bill represents the defendant himself to have made

the agreement; therefore, any representation of Caunto Baboo relative to an agreement, not stated to have been made by him, would not be the statement of an agent, supposing such statement was to be admitted in evidence. The plaintiff fails first in showing Caunto Baboo was the agent of the defendant. In this case, such a fact as Caunto Baboo is represented to have stated is matter not of admission, but of testimony. A man cannot admit what another has done, or has agreed to do; but he must prove it. When put upon the proof that the defendant made the agreement, it is absurd to say Caunto Baboo admitted he made it. In truth he does not admit that the defendant made it. But suppose Caunto Baboo distinctly proved the agent of the defendant, and that he said he knew the defendant did make the agreement for this loan, and did promise and undertake to give a bond for the money, and did execute a bond, but gave the bond, not to the plaintiff, but to the witness, and he gave it back to the defendant, who undertook to calculate the interest, and to give a bond for the whole; all this would be no evidence whatsoever of what the defendant had agreed to do, or had done, or omitted to do; and without evidence of his agreement, or his acts, or his breach of agreement, it is utterly impossible to support this bill.

The bill was dismissed.[1]

HARLAN, J., IN VICKSBURG & MERIDIAN CO. v. O'BRIEN.

1886. SUPREME COURT OF THE UNITED STATES. 119 U. S. 99.

AT the trial below, plaintiffs introduced one Roach as a witness, who, during his examination, was asked whether he did not, shortly after the accident, have a conversation with the engineer having charge of defendant's train at the time of the accident, about the rate of speed at which the train was moving at the time. To that question the defendant objected, but its objection was overruled, and the witness permitted to answer. The witness had previously stated that, on examination of the track after the accident, he found a cross-tie or cross-ties under the broken rail in a decayed condition. His answer to the above question was: "Between ten and thirty minutes after the accident occurred, I had such a conversation with Morgan Herbert, the engineer having charge of the locomotive attached to the train at the time of the accident, and he told me that the train was moving at the rate of eighteen miles an hour." The defendant renewed its objection to this testimony by a motion to exclude it from the jury. This motion was denied, and an ex-

[1] "What an agent says about the business of his principal, when he is engaged in doing it, may always be heard, not as mere declarations, but as explaining the character and quality of the act. The words spoken are a part of the thing done." Black, J., in Dick v. Cooper, 24 Pa. St. 217, 221.

ception taken. As bearing upon the point here raised it may be stated that, under the evidence, it became material—apart from the issue as to the condition of the track—to inquire, whether, at the time of the accident (which occurred at a place on the line where the rails in the track were, according to some of the proof, materially defective), the train was being run at a speed exceeding fifteen miles an hour. In this view, the declaration of the engineer may have had a decisive influence upon the result of the trial.

There can be no dispute as to the general rules governing the admissibility of the declarations of an agent to affect the principal. The acts of an agent, within the scope of the authority delegated to him, are deemed the acts of the principal. Whatever he does in the lawful exercise of that authority is imputable to the principal, and may be proven without calling the agent as a witness. So, in consequence of the relation between him and the principal, his statement or declaration is, under some circumstances, regarded as of the nature of original evidence, "being," says Phillips, "the ultimate fact to be proved, and not an admission of some other fact." 1 Phil. Ev. 381. "But it must be remembered," says Greenleaf, "that the admission of the agent cannot always be assimilated to the admission of the principal. The party's own admission, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only when it is made during the continuance of the agency in regard to a transaction then depending, *et dum fervet opus*. It is because it is a verbal act and part of the *res gestæ* that it is admissible at all; and therefore, it is not necessary to call the agent to prove it; but wherever what he did is admissible in evidence, there it is competent to prove what he said about the act while he was doing it." 1 Greenleaf, § 113. This court had occasion in Packet Co. v. Clough, 20 Wall. 540, to consider this question. Referring to the rule as stated by Mr. Justice Story in his Treatise on Agency, § 134, that "where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time, and constituting part of the *res gestae*," the court, speaking by Mr. Justice Strong, said: "A close attention to this rule, which is of universal acceptance, will solve almost every difficulty. But an act done by an agent cannot be varied, qualified, or explained, either by his declarations which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done, at a later period. The reason is that the agent to do the act is not authorized to narrate what he had done, or how he had done it, and his declaration is no part of the *res gestae*."

We are of opinion that the declaration of the engineer Herbert to the witness Roach was not competent against the defendant for the purpose of proving the rate of speed at which the train was moving at the time of the accident. It is true that, in view of the

engineer's experience and position, his statements under oath, as a witness, in respect to that matter, if credited, would have influence with the jury. Although the speed of the train was, in some degree, subject to his control, still his authority, in that respect, did not carry with it authority to make declarations, or admissions at a subsequent time, as to the manner in which, on any particular trip, or at any designated point in his route, he had performed his duty. His declaration, after the accident had become a completed fact, and when he was not performing the duties of engineer, that the train, at the moment the plaintiff was injured, was being run at the rate eighteen miles an hour, was not explanatory of anything in which he was then engaged. It did not accompany the act from which the injuries in question arose. It was, in its essence, the mere narration of a past occurrence, not a part of the *res gestae*—simply an assertion or representation, in the course of conversation, as to a matter not then pending, and in respect to which his authority as engineer had been fully exerted. It is not to be deemed part of the *res gestae,* simply because of the brief period intervening between the accident and the making of the declaration. The fact remains that the occurrence had ended when the declaration in question was made, and the engineer was not in the act of doing anything that could possibly affect it. If his declaration had been made the next day after the accident, it would scarcely be claimed that it was admissible evidence against the company. And yet the circumstance that it was made between ten and thirty minutes—an appreciable period of time—after the accident, cannot, upon principle, make this case an exception to the general rule. If the contrary view should be maintained, it would follow that the declarations of the engineer, if favorable to the company, would have been admissible in its behalf as part of the *res gestæ,* without calling him as a witness—a proposition that will find no support in the law of evidence. The cases have gone far enough in the admission of the subsequent declarations of agents as evidence against their principals. These views are fully sustained by adjudications in the highest courts of the states.[1]

[1] "The declarations, admissions, or acts of an agent are evidence against his principal, only when they are made as to a business matter within the scope of his agency, and which is being transacted at the time. A person who is appointed an agent for a specified and limited purpose has no right to exceed his authority, and if he does, his acts or declarations are not binding upon his principal, unless subsequently ratified." Buskirk, J., in Rowell v. Klein, 44 Ind. 290, 293. See Pa. Co. v. Bridge Co., 170 Ill. 645.

"When the owner of property previously acquired intrusts it to an agent solely to operate, he does not thereby give him authority to declare away his right or title or to make competent evidence against it by his mere declarations." Hook, Cir. J., in State of Missouri v. Hencken, 174 Fed. 624, 626. See particularly Caldwell v. Nelson Morris & Co., 125 La. 302.

McENTYRE v. LEVI COTTON MILLS.

1903. Supreme Court of North Carolina. 132 N. C. 598.

Montgomery, J.—The plaintiff brought this action in the court of a justice of the peace to recover of the defendant $8.35 for work and labor done in the defendant's cotton mill. Judgment was rendered against the defendant for the amount claimed by the plaintiff. The defendant's defense was that by a rule of the company the usual and customary pay day of the defendant for work in the factory was on the 14th of April, and as the action was commenced before the pay day, *i. e,* before the amount was due, the plaintiff could not recover. On the appeal of the defendant, the jury answered the issue, "Is the defendant indebted to the plaintiff and if so in what amount? Yes, $8.35." In the superior court a witness, Wood, testified that he heard M. Levi, president of the cotton mills, and R. H. Smith, the superintendent, testify in the justice's court. Wood was then permitted to testify over the defendant's objection that he heard Smith say, in the trial before the justice, that he, Smith, had discharged the plaintiff from service at the mill; that Levi in the justice's court did not deny owing the amount sued for, but that the amount was not due until the 14th of April. The evidence of Wood was not competent. When the defendant company filed its answer to the claim of the plaintiff, the power of the president or superintendent to make any further admission or declaration which could bind the company in reference to the cause of action, had passed. The admissions or declarations of the agent are received in evidence against the principal, not as admissions or declarations merely, but as parts of the *res gestæ;* hence, only such as accompany the transaction in which the agent acted can be proved; what the agent said at a subsequent time is inadmissible. Rice on Evidence, 446. Whatever therefore the agent does, in the lawful prosecution of that business, is the act of the principal whom he represents. And (Story) "Where the acts of the agent will bind the principal, then his representations, declarations and admissions respecting the subject-matter will also bind him, if made at the same time and constituting part of the *res gestæ.*" Greenleaf on Ev., § 184 c; Branch v. R. Co., 88 N. C. 573; Craven v. Russell, 118 N. C. 564. It makes no difference that the agents Levi and Smith were officers of a corporation. The same rule applies. Smith v. Melton, 68 N. C. 108; Rumbough v. Imp. Co., 112 N. C. 751; 34 Am. St. 528.

New trial.[1]

[1] Compare Ill. Cent. R. R. Co. v. Tronstine, 64 Miss. 834.

"How far the statements of the agent are binding upon and competent to be given against the company, and to what extent they are part of the *res gestæ,* depends upon the circumstances of each particular case." Sherwood, J., in Keyser v. Chicago, etc., Ry. Co., 66 Mich. 390, 395.

McENTYRE v. LEVI COTTON MILLS

1903. SUPREME COURT OF NORTH CAROLINA. 132 N. C. 598.

MONTGOMERY, J.—The plaintiff brought this action in the court of a justice of the peace to recover of the defendant $6.37 for work and labor done in the defendant's cotton mill. Judgment was rendered against the defendant for the amount claimed by the plaintiff. The defendant's defense was that by a rule of the company the usual and customary time [illegible] the defendant for work in the factory was [illegible] and that as the action was commenced before the [illegible] the amount was due, the plaintiff could not recover. [illegible] appeal of the defendant, the jury answered [illegible] defendant indebted to the plaintiff, and if so in what amount? [illegible] $6.37." In the superior court a witness [illegible] heard M. Levi, president of the cotton mills, and [illegible] the superintendent, testify in the justice's court. When the witness was permitted to testify over the defendant's objection [illegible] in the trial before the justice that [illegible] the plaintiff [illegible] to the mill, and [illegible] court did not deny owing the amount sued [illegible] was not due until the [illegible] of April. The [illegible] exception. When the defendant [illegible] the claim of the plaintiff the power of the [illegible] to make any further admission or declaration [illegible] in reference to the cause of action [illegible] admissions or declarations of the agent are [illegible] the principal, not as admissions or [illegible] only such as [illegible] in which the agent acted can be proved [illegible] at a subsequent time is inadmissible. [illegible] the agent does, in the lawful prosecution of that business, is the act of the principal whom he represents [illegible] the acts of the agent will bind the principal [illegible] declarations and admissions respecting the [illegible] made at the same time and constituting part of the res gestae." Greenleaf on Ev., § 113 [illegible] N. C. [illegible] Russell, [illegible] N. C. [illegible]. It [illegible] Levi and Smith were officers of a corporation. The same rule applies. Smith v. [illegible] N. C. [illegible] N. C. 751 [illegible]

(AFFIRMED.)

[1] [illegible]

[2] [illegible]

CHAPTER VIII.

RATIFICATION.

Section 1.—What Acts Can be Ratified.

SHARSWOOD, J., IN NEGLEY ET AL V. LINDSAY.

1870. SUPREME COURT OF PENNSYLVANIA. 67 Pa. St. 217.

OF course, where a contract is void on the ground of public policy, or against a statute, as the usury law, there is every reason to hold the confirmation affected with the original taint: Shelton v. Marshall, 16 Texas 344. Certain it is, that the doctrine that a contract, void on account of fraud practised on the party, is incapable of confirmation, is not the generally received doctrine of the elementary writers: 1 Story's Eq. Jur. 345; Addison on Contracts 273; 1 Sugden on Vendors 276; 2 Parsons on Contracts 780. But however this may be, we must now consider Duncan v. McCullough as overruled by Pearsoll v. Chapin, 8 Wright 9, in which it was expressly decided that a contract tainted with fraud may be confirmed or ratified without a new contract founded on a new consideration. It is there said that he who knowingly accepts and retains any benefit under such a contract, or who uses the property acquired as his own, after the discovery of the fraud, or who does any positive act forgiving the fraud, or unduly delays claiming back his property or giving up what he received, affirms the validity of the contract; and decisions in the courts of our sister states are cited in support of these instances. To which may be added James v. Emery, 40 N. Ham. 348; Mason v. Bovet, 1 Denio 69; The Mattiawan Co. v. Bentley, 13 Barbour 641; Wheaton v. Baker, 14 *id.* 594.

"Ratification," says Chief Justice Lowrie, "is in general the adoption of a previously formed contract, notwithstanding a view that rendered it relatively void; and by the very nature of the act of ratification, confirmation or affirmance (all these terms are in use to express the same thing), the party confirming becomes a party to the contract, he that was not bound, becomes bound by it, and entitled to all the proper benefits of it; he accepts the consideration of the contract as a sufficient consideration for adopting it, and usually this is quite enough to support the ratification. A mere

ratification cannot, of course, correct any defect in the terms of the contract. If it is in its very terms invalid for want of consideration or for any other defect, a mere ratification can add nothing to its binding force." These principles are only a recurrence to those advanced by Lord Chancellor Hardwicke in Chesterfield v. Janssen, 2 Ves. 125, 1 Atk. 354, the result of which was, that if the original contract be illegal or usurious, no subsequent agreement or confirmation of the party can give it validity. But if it be merely against conscience, then, if the party, being fully informed of all the circumstances of it, and of the objections to it, in his own words, "with his eyes open," voluntarily confirms it, he thereby bars himself of that relief, which he might otherwise have had in equity: 1 Fonblanque's Eq. b. 1, Ch. 2, § 13, n. Upon the principles thus established we discover no error in the rulings of the learned judge below upon this subject.[1]

TOWNSHIP OF TAYMOUTH v. KOEHLER.

1876. Supreme Court of Michigan. 35 Mich. 22.

Marston, J.—Koehler brought an action of *assumpsit* against the township to recover the value of certain iron, furnished to be used in the construction of a bridge, under a written agreement made with one of the commissioners of highways of said township.

Several questions were raised and discussed relating, first, to the authority of said commissioners of highways to authorize the making of the contract in question, which it was said depended upon the regularity and validity of a special meeting of the people of the town called to vote moneys to build this bridge; second, as to whether the board had authorized the making of the contract in question; and, third, whether there was or could be a ratification by the board of the acts and contracts of the commissioner who made the contract under which the iron was furnished, which would render the township liable, even if the contract was not valid in the first instance.[2] * * *

3. As to ratification, there may in certain cases be a ratification by the corporation of an unauthorized contract. It must, however, in such cases appear that the contract was one which could in the first instance have been legally entered into by the corporate authorities. And while there may be cases where knowledge that work

[1] An act void by reason of illegality or otherwise cannot be ratified. Boutelle v. Melendy, 19 N. H. 196; Sanford v. Johnson, 24 Minn. 172; Macfarland v. Heim, 127 Mo. 327.

[2] A portion of the opinion dealing with the first and second questions stated by the court is omitted.

is being performed for the use and benefit of a corporation under an unauthorized contract, and the corporation afterwards accepts and makes use of the work done, would amount to a ratification; yet this is not one of that class of cases. The fact that the people of the township made use of the bridge when traveling upon the public highway would not be an acceptance, and cannot be so construed. If this were so, then a party placing an unauthorized structure over or on a public highway could thus compel the people to either pay for the same or abandon the use of the highway entirely, lest such use could be construed into an acceptance and liability to pay. Wilson v. School District, 32 N. H. 118; see 1 Dillon on Mun. Corp., §§ 385, *et seq.* Again, the proper parties to ratify a contract are those who could in the first instance have legally made such a contract. The people of the township are given no such authority, so that their action in the use of the bridge cannot for this reason be held a ratification; neither could the members of the board severally. But if the board, while work was in progress, or after it was completed, met, either according to notice previously given, or all the members got together without such notice, and with a knowledge of what had been done, approved of and ratified it, we think the township would be bound by such action. Argenti v. San Francisco, 16 Cal. 255.

4. The question still remains, was the contract in this case one which the board could have authorized or ratified without a vote of the people under § 752, *et seq.* 1 Comp. L., § 1306 provides that if any bridge over any stream intersected by a highway in any township in this state has been injured or destroyed by the occurrence of a freshet or from any other cause, it shall be the duty of the highway commissioners of such township, on application, etc., to proceed with all convenient dispatch to repair or reconstruct such bridge, as the case may require, under the personal supervision of one of their number, or by letting a contract therefor, under existing provisions of law, provided that a majority of the commissioners shall, after a personal examination, determine that the public interests and convenience require such repairs to be made, or that such bridge ought to be rebuilt, and provided also that the sum to be expended shall not in any one year exceed one thousand dollars. There are other provisions giving the commissioners the care and superintendence of bridges over streams intersecting highways, but it is unnecessary to refer to them in detail. The contract in this case is one apparently within the general power of the board. A third party entering into such a contract with one of the commissioners has a right to assume that the contract is, in fact as in appearance, a proper one. So long, therefore, as the contract does not upon its face show that it is one beyond the power of the board to enter into, or to authorize one of their number to enter into, and the other contracting party is not notified to the contrary,

but goes on and in good faith furnishes the materials, he will be entitled to recover, if it appears, as already stated, that the commissioner was authorized by the board to make such a contract, or that his action was afterwards ratified by the board. For all materials furnished under any such contract, the statute points out a method of payment.

As the rulings of the court below were inconsistent with what has been here said, the judgment must be reversed, with costs, and a new trial granted.

The other justices concurred.

STATE OF WISCONSIN v. TORINUS AND OTHERS.

1879. SUPREME COURT OF MINNESOTA. 26 Minn. 1.

THE state of Wisconsin brought this action, in the district court for Washington county, as endorsee of a promissory note made by defendants to the order of one Harriman. The averments of the complaint are, in substance, as follows:

On March 3, 1869, the legislature of Wisconsin passed an act authorizing the Governor to appoint one or more agents whose duty it should be to preserve and protect the timber growing on the lands theretofore granted by congress to the state to aid in the construction of railroads, and to seize, in the name and on behalf of the state, all logs and timber that should be cut or carried away from such lands without lawful authority, and to sell the same at public auction to the highest bidder for cash, the money to be immediately paid into the state treasury. From May, 1869, until 1874, Harriman was the duly appointed agent of the plaintiff, under this act, and in the summer of 1873 he received a large quantity of pine saw logs, which the defendants, during the previous winter, had wrongfully cut on certain of the lands described in the act and belonging to plaintiff, and had driven to the St. Croix boom. The logs thus seized Harriman advertised for sale at public auction, for cash, to the highest bidder, and at the sale, on July 25, 1873, they were struck off and delivered to the defendants, who at once converted them to their own use, and have never paid the plaintiff anything therefor.

On December 23, 1873, the defendants, in consideration of such sale and delivery, made the note in suit, whereby they promised to pay to Harriman or order $8,799.66, on May 1, 1874, with interest at ten per cent. per annum, which note, before maturity, was endorsed and delivered by Harriman to the plaintiff.

On February 15, 1878, the legislature of Wisconsin passed an

has gone on and in good faith furnishes the materials he will be entitled to recover, it is apparent, as above stated, that the commissioner was authorized by the board to make such a contract, or that his action was afterwards ratified by the board. For all materials furnished under any such contract, the statute points out a method of payment.

As the rulings in the court below were inconsistent with what has been here said, the judgment must be reversed, with costs, and a new trial granted.

The other [illegible]

STATE OF [illegible] v. TORINUS and Others.

1879 [illegible] Court of Minnesota. 20 Minn. 1.

The state of [illegible] brought this action, in the district court for Washington [illegible] subscription of a promissory note made by defendants to the [illegible] Torinus. The averments of the complaint [illegible] as follows:

[illegible] the legislature of Wisconsin passed an act [illegible] to appoint one or more agents whose [illegible] and protect the timber growing on the [illegible] ingress to the same to aid in the collection of [illegible] in any action and on behalf of the state of [illegible] that could be cut or carried away [illegible] authorities, and to sell the same at public [illegible] for cash, the money to be immediately paid into the [illegible] from May, 1869, until 1874, [illegible] on behalf of the plaintiff, under this act and in the [illegible] received a large quantity of [illegible] logs, which [illegible] during the previous winter, [illegible] only of a [illegible] lumber in the air and belonging to [illegible] on the St. Croix boom. The logs were sawed [illegible] a reasonable [illegible] for cash, to the [illegible] that [illegible] 1869, they were struck off and delivered [illegible] at once converted them to their own [illegible] and the amount anything due [illegible]

On December 23, [illegible] the [illegible] in consideration of such sale and delivery, [illegible] to pay [illegible] sixty [illegible] interest at [illegible] on May 1, 1874, with interest at ten per cent. per annum [illegible] maturity, was executed and delivered [illegible] plaintiff.

On February 15, [illegible] the legislature of Wisconsin passed an

act expressly ratifying and confirming the sale made by Harriman to the defendants, and the note taken by him on account thereof, and making the same valid from the beginning as fully as if he had always had full authority to sell on credit and to take the note. Immediately after the passage of this act the present suit was brought.

A general demurrer to the complaint was overruled by Brill, J., acting for the judge of the first district, and the defendants appealed.

In a former suit between the same parties, on the same note, prior to the act of 1878, the defendants had judgment on the ground that as Harriman had no authority to sell except for cash, the sale made by him was unauthorized and void, and the note, having no other consideration than the sale, was also null and void, and that the sale could be ratified and made good, only by act of the legislature of Wisconsin. See 24 Minn. 332.

CORNELL, J.—In a former action between these parties, the question was presented to this court, on appeal therein, as to the validity of the note in controversy in this action. Upon the facts therein stated, it was held invalid for want of consideration, for the reason that it was given solely upon an unauthorized sale of logs from plaintiff to defendants, made by an agent of the former, by which no title or interest whatever in the property was transferred: 24 Minn. 332. Since then, and before the commencement of this action, the state, by legislative enactment, has duly and fully ratified and adopted the act of its agent Harriman in making the sale and taking the note, and the question now before us relates to the legal effect of this ratification. It is objected that it is ineffective for any purpose, because a contract void as prohibited by statute cannot be made good by a subsequent statute. While this is true as to acts and contracts made absolutely void and prohibited by law because of their illegal character, and as being *contra bonos mores*, the rule has no application to the facts of this case. Giving credit on the sale of logs, or taking notes in payment, is not prohibited by any law or statute. The act of Harriman as the agent of the state in giving credit to the defendants on the sale of his principal's property to them, though unauthorized and impliedly prohibited by the statute which gave him his authority was not in itself an act of a wrongful or immoral nature, or tainted with any vice of illegality of that character, nor was it prohibited as such by any statute. The statute under which he acted was not directed to that end. It was rather in the nature of a power of attorney, which conferred upon the agents of the state a specific and limited authority in reference to certain matters, and which defined particularly the extent of such authority. In making the sale of his principal's property on time, and taking a note for the purchase money, the agent, Harriman, exceeded his delegated authority, and, for that reason alone, his act was an invalid one. It was competent, however, for the state as

principal to make it good by a legislative enactment, adopting it as its own; for it could have authorized it in the first instance, and whatever it can do or direct to be done originally it can subsequently, and, when done, lawfully ratify and adopt, with the same effect as though it had been properly done under a previous authority. That the state might, through its legislature, in the absence of any prohibition in its fundamental law, have authorized Harriman as its agent, in the first place, to make the very sale he did admits of no doubt. The proprietary rights of a state are as absolute and unqualified as those of an individual. It may, in the absence of any self-imposed restrictions in its constitution, sell and dispose of its property upon its own terms and conditions for cash or upon credit; and it may also take, hold, and enforce notes and obligations received from the purchasers of its property the same as individuals can. But as the legislative department is the only one that represents the state in respect to such rights, it alone can exercise the power necessary to the enjoyment and protection of those rights, by the enactment of statutes for that purpose. In the case before us, the state has duly ratified the acts of its agent in making the sale to the defendants, so that the title to the property which they purchased, the possession of which they still hold, has become perfect, and they cannot longer object that the note they gave is without consideration.[1] * * *[2]

Order affirmed.

SHISLER v. VANDIKE.

1880. Supreme Court of Pennsylvania. 92 Pa. St. 447.

Assumpsit by George H. Vandike and Theophilus G. Vandike, trading as George H. Vandike & Co., against John A. Shisler, as endorser of a promissory note, dated July 2d, 1875, at four months, for $1,500, drawn by Catherine Shisler to the order of George A. Shisler, and endorsed by George A. Shisler, Charles Shisler and John A. Shisler.

At the trial it appeared, both by the evidence of plaintiffs and of George A. Shisler, who was called for the defendant, that the note in suit was given by George A. Shisler to pay an indebtedness of said George to plaintiffs. The latter testified that they had sent for John A. Shisler and showed him the note, and that he denied that it was his endorsement, but said that he had authorized his brother

[1] A portion of the opinion dealing with the character of the plaintiff's title is omitted.

[2] See also State v. Executor of Joel Buttles, 3 Ohio St. 309.

principal to make it good by a ratification equivalent, adopting it as its own; for it could have authorized it in the first instance, and whatever it can do originally it can subsequently, and, when [illegible] fairly and adopt [illegible] with the same effect as though it had been originally done under a previous authority. That the [illegible] through its legislature, in the absence of any prohibition [illegible] authorized Harrison as its agent to do the [illegible], is more the very fact he did admit, as to [illegible] ordinary rights of a state are as absolute and unqualified as [illegible] individual. It may, in the absence of any self-imposed [illegible] in its constitution, sell and dispose of its property [illegible] and conditions for cash or upon credit, and [illegible] hold, and enforce notes and obligations [illegible] for the payment of its property the same as individuals can. [illegible] legislative department is the only one [illegible] to such rights, it alone can exercise the power [illegible] enforcement and protection of those rights by the [illegible] for that purpose. In the case [illegible] pointed the act of its agent in making the [illegible] that the title to the property which [illegible] of which they still hold, has become [illegible] objection that for now they gave is

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[illegible] v. VANDIKE.

1880. [illegible] 94 Pa. St. 447.

Assumpsit by [illegible] Vandike and Theophilus G. Vandike, trading as George [illegible] & Co., against John A. Shisler, as endorser of a promissory [illegible] July 20, 1875, at four months, for $2,500, drawn by [illegible] Shisler to the order of George A. Shisler, and endorsed [illegible] A. Shisler, Charles Shisler and John A. Shisler.

[illegible] the trial it appeared that [illegible] endorsements of Charles and of George A. Shisler [illegible] on the execution, that the note in suit was given by [illegible] Shisler to pay an indebtedness of said George to plaintiffs; [illegible] and they had sent for John A. Shisler and [illegible] Thereon, and that he denied that it was his endorsement, [illegible] he had authorized his brothers

[1] A portion of the opinion [illegible] the execution of the plaintiff's title is omitted.

[2] See also Shisler v. [illegible] 94 Pa. St. 446.

to endorse for him, and that he considered himself liable under that name, and declared that his name was not John A., but John V. Shisler. A salesman of Vandike & Co. testified that he was present at this interview, and heard one of the Shisler brothers say that they did not sign the note, but authorized their signatures to be put thereon. The defendant testified that he did not endorse the note nor authorize anyone to do so for him, and that he had never admitted that he had authorized George to endorse for him. George Shisler, called for the defendant, testified: "I brought my two brothers to Mr. Vandike's to get the note; they both knew of this note before this interview; I did not endorse the names on the back of the note; never told Vandike that I was authorized to endorse the note; I thought they were genuine signatures. At the interview in Vandike's store, heard my brother John distinctly state to George Vandike that he authorized the signature to that note."

The defendant, *inter alia,* submitted the following point: "If you believe that the name of John V. Shisler was endorsed by another person without his authority, and that he subsequently without any new consideration, ratified or confirmed it, your verdict must be for the defendant."

The court declined to affirm this point, and in the general charge, *inter alia,* said, "that the theory of the plaintiffs was that George signed the note as his brother's agent, either with his previous authority or a subsequent ratification, and if the jury believe that view of the evidence, the act was capable of ratification."

The court also charged; "I instruct you that you may disregard the matter of consideration, the evidence being that the plaintiffs took the note in satisfaction of the debt."

The verdict was for the plaintiffs. After judgment, defendant took this writ, and alleged that the court erred in the answer to the above point, and in the portion of the charge noted.

Edwin S. Dickson and Nathan H. Sharpless, for plaintiffs in error.

The court, in saying that the plaintiffs received the note in satisfaction of a debt, took the question of fact from the jury. The court was asked to charge, in substance, that if the endorsement was a forgery, and the ratification or confirmation relied on by the plaintiffs was without any new consideration, the plaintiffs could not recover. That this proposition is sound in law is distinctly ruled in McHugh v. County of Schuylkill, 17 P. F. Smith 391. The court should have simply affirmed defendant's point.

P. F. Rothermel, for defendants in error.

To sustain the position that the doctrine, "a subsequent ratification is equal to a prior command," does not apply in this case, the defendants cite a single authority: McHugh v. County of Schuylkill, a case standing by itself, unsupported by any decision, and since overruled. The opinion therein was based upon three cases: Duncan v. Mc-Cul-

lough, 4 S. & R. 483; Chamberlain v. McClurg, 8 W. & S. 31, 36, and Goepp's Appeal, 3 Harris 428, all of which were expressly overruled in Negley v. Lindsay, 17 P. F. Smith 217, a case decided a few months previous to McHugh v. County of Schuylkill, and reported in the same volume of reports.

In Negley v. Lindsay, *supra,* it was held, "Where a contract is void on the ground of public policy, or against a statute, its confirmation is affected with the original taint." "Where a contract is void on account of fraud practised on the party it may be confirmed or ratified without a new contract, founded on a new consideration."

Mr. Justice Gordon delivered the opinion of the court, January 26, 1880.

There was no error committed by the court in saying to the jury, "I instruct you that you may disregard the matter of consideration, the evidence being that the plaintiffs took the note in satisfaction of the debt."

There seems to have been no dispute about this on the trial; the whole evidence most clearly proves that the note was intended to apply upon the indebtedness of George A. Shisler to the plaintiffs, and for that purpose it was endorsed, if indeed it were endorsed at all. It was not a pledge of the note as collateral security for a precedent indebtedness, but was given to apply in payment of such indebtedness, and hence was similar to a check drawn for that purpose.

The remaining question is, if George A. Shisler, or anyone else, fraudulently endorsed the name of John V. Shisler, would an after ratification render such endorsement good and available in the hands of good-faith endorsers? The court below thought it would, and so instructed the jury. This instruction seems to us in the first place, wrong in this, that we can find no evidence to warrant it. There was testimony, and abundance of it, that John had authorized the putting of his name upon the paper, but none whatever that he had subsequently ratified the endorsement, either by word or deed.

The question, however, remains, could the forged endorsement, conceding it to be such, be ratified and thus made good? This question must be answered in the negative, if we accept as authority the case of McHugh v. Schuylkill County.

This case is in point; there, as here, the question was whether there could be an after ratification of a forged obligation, and it was held that there could be no such ratification. It is true, the dicta of this case, going as they do beyond the point ruled, would indicate that no contract, vitiated by fraud of any kind, is the subject of subsequent ratification. But this cannot be sustained, as it is opposed to those decisions now regarded as law, notably, Pearsoll v. Chapin, 8 Wright 9, and Negley v. Lindsay, 17 P. F. Smith 217. The distinction between these cases seems to be this, where

the fraud is of such a character as to involve a crime, the ratification of the act from which it springs is opposed to public policy, and hence, cannot be permitted, but where the transaction is contrary only to good faith and fair dealings; where it affects individual interests, and nothing else, ratification is allowable. It is indeed, conceded, in the cases last above cited, that if the original contract be illegal, or void for want of consideration, no subsequent ratification will help it. If, however, the endorsement under consideration was forged, it was not only void for want of authority, but it was also illegal, and so, comes under the condemnation of all authority.

In Garrett v. Gonter, 6 Wright 143, the question was, whether a mortgage, executed under the authority of a forged power of attorney, was the subject of ratification, and it was held that it was. But here there was no forgery of the mortgage itself, for it was executed under a supposed power. Mr. Justice Strong, who delivered the opinion, says: "It is hardly accurate to speak of ratifying a forged instrument. It may be adopted, but adoption does not relate back and validate prior acts. If the letter of attorney was forged in 1854, no act of Mrs. Gonter in 1859, after her return from Europe, could make it efficient from its date. But she could confirm the mortgage, for that was executed in her name by a professed agent, acting under a real or pretended authority." Now, if we properly understand what is here said, it amounts to this: the mortgage, executed without a fraudulent intent, by a professed agent, under a supposed power, was susceptible of ratification, whilst, on the other hand, the forged letter of attorney was not susceptible of such ratification. This, of course, presupposes the innocency of both the agent and mortgagee, otherwise the mortgage itself would have been a fraud, and hence no more the subject of ratification than was the power. It is possible this case was strained in favor of the mortgagee, for it is very clear from the evidence, the verdict of the jury to the contrary, notwithstanding, that the power of attorney was genuine. However, be this as it may, this case does not conflict with that of McHugh v. Schuylkill County, and we must therefore consider the latter as of binding authority. We conclude, then, that as, from the evidence, in the case in hand, the doctrine of ratification could have no place, except as operative upon a forged instrument, it should have been wholly excluded, since being admitted, it amounted to the ratification of an illegal and criminal act. This sustains the fourth and fifth assignments of error.

Judgment reversed and a new venire awarded.[1]

[1] *Accord:* Brook v. Hook, L. R. 6 Ex. 89.

In Woodruff v. Munroe, 33 Md. 146, it was held that one, whose signature as maker of a note was forged, would be estopped from setting up the forgery as a defense, when he had induced a holder in due course to take the note by

HENRY ET AL. V. HEEB.

1887. SUPREME COURT OF INDIANA. 114 Ind. 275.

MITCHELL, C. J.—This was a suit by Nicholas Heeb against Henry Heeb, John F. Schonert, and James D. Henry, to recover the amount of two promissory notes signed by Heeb and Schonert, who were partners, as principals, and by James D. Henry, as surety.

The controversy is between the plaintiff and the appellant Henry, and relates exclusively to the note described in the second paragraph of the complaint, the execution of which Henry denied under oath. To the denial of the latter, the plaintiff replied, in substance, that the defendant, after having obtained full knowledge that the plaintiff held the note in controversy, ratified and confirmed the same, and promised to pay it, and accepted a chattel mortgage covering the partnership property of Heeb and Schonert, the principal debtors, as indemnity against any liability which might exist on account of his having become surety on the note. This was held to be a sufficient reply.

While there was much evidence tending to prove that the signature of Henry, as it appeared on the note, was his genuine signature, there was also evidence tending to prove that it was not genuine. The extent to which the evidence went in that regard was to affirm the genuineness of the signature on the one hand and to deny it on the other. There was no evidence tending to incriminate any particular person, or directly pointing to any one as having perpetrated the crime of forgery in respect to the appellant's signature. Besides, there was evidence which tended to show that one of the principal makers of the note had, with the appellant's consent, filled out blank notes, which had been previously signed by the latter as surety, and upon which the firm subsequently obtained loans of money.

The appellant testified that he neither signed nor authorized anyone to sign his name to the note, "to the best of his knowledge."

There was some evidence tending to show that Henry recognized the validity of the note, and his liability to pay it, and that he had knowledge of the execution of a chattel mortgage by Schonert in the firm name to secure him and other creditors of the firm and that the note in suit was one of the claims mentioned in the mortgage as having been signed by Henry as surety for Heeb and Schonert.

Relevant to the issue made by the plea of *non est factum,* and the reply thereto, and the evidence pertaining to that feature of the case, the court instructed the jury, in substance, that if the

representing that the signature was genuine. See *dictum* to same effect in Workman v. Wright, 33 Ohio St. 405.

appellant after having obtained full knowledge [illegible] of execution of the note, ratified and confirmed the same and promised to pay it, he would be liable on the original [illegible]. The judgment must be affirmed with [illegible]. The rulings on the demurrer to the reply, and the [illegible] are considered as a waiver for the purposes of the judgment. The case and the motion for a new trial [illegible] the same question.

It does not appear that the promise of the appellee induced the plaintiff to change his position in any manner, or that in reliance thereon he surrendered any right or became prejudiced. There is, therefore, no element of estoppel in the case as presented either in the pleading or in the instruction of the court.

The appellant contends that a person whose name has been forged to a note cannot ratify or adopt the [illegible] act so as to become bound, unless facts have intervened which create an estoppel and precludes him from setting up as a defense, that the signature is not genuine. This appears to be an irreconcilable conflict in the decisions of the courts of last resort on this question. Thus in Wellington v. Jackson, 121 Mass. 157, the supreme judicial court of Massachusetts, following its earlier decisions, held that one whose signature had been forged to a promissory note, who, [illegible] with knowledge of all the circumstances and intending to be bound by it, acknowledged the signature, and thus assumed the note as his own, was bound to the same extent as if the note had been signed by him originally, without regard to whether or not his acknowledgment amounted to an estoppel in pais. Greenfield Bank v. Crafts, 4 Allen 447; Bartlet v. Tucker, 104 Mass. 336 [illegible]; Ames, 330. To the same effect is Heffner v. Vandolah, 30 [illegible]; Pittsfield v. School Commissioners, 7 Hun [illegible]; 60 N. Y. Dec. 76.

There are other cases which, while seeming to [illegible] the doctrine that a forged signature may be ratified, [illegible] upon the proposition that the holder of the note [illegible] relied in reliance upon the promise or admission [illegible] whose name appeared on the note, so that the latter has [illegible] or participated in his consideration for which the note has been given and was therefore estopped to deny the genuineness of his signature. Still other decisions depend upon principles which distinguish them from cases involving the [illegible] of [illegible] of forged instruments purely. [illegible] 33 Me. 103; Jennings v. Lee, 46 Ill. 136; Corser v. [illegible], 24 Am. Dec. 755; Woodruff v. Monroe, 33 [illegible]; Middlemore, 59 Penn. 95; Lawrence v. Wiley, [illegible]; Commercial Bank v. Warren, 15 N. Y. 577; Crow v. [illegible], 5 L. R. [illegible]; McKenzie v. British Linen Co., L. R. 6 App. [illegible]; Vowell v. Starr, 1 Peck. 528.

appellant, after having obtained full knowledge upon the subject of whether or not he executed the note, ratified and confirmed the same and promised to pay it, he would be liable for the amount thereof. The judgment was favorable to the plaintiff below. The ruling on the demurrer to the reply, and the giving of the above instructions are complained of as a cause for the reversal of the judgment. The reply and the instruction present substantially the same question.

It does not appear that the promise of the appellant induced the plaintiff to change his position in any manner, or that in reliance thereon he surrendered any right or benefit whatever. There is therefore, no element of estoppel in the case as presented either in the pleading or in the instruction of the court.

The appellant contends that a person whose name has been forged to a note cannot ratify or adopt the criminal act, so as to become bound, unless facts have intervened which create an estoppel and preclude him from setting up, as a defense, that his signature is not genuine. There appears to be an irreconcilable conflict in the decisions of the courts of last resort on this question. Thus in Wellington v. Jackson, 121 Mass. 157, the supreme judicial court of Massachusetts, following its earlier decisions, held that one whose signature had been forged to a promisory note, who yet, with knowledge of all the circumstances, and intending to be bound by it, acknowledged the signature, and thus assumed the note as his own, was bound to the same extent as if the note had been signed by him originally, without regard to whether or not his acknowledgment amounted to an estoppel *in pais;* Greenfield Bank v. Crafts, 4 Allen 447; Bartlet v. Tucker, 104 Mass. 336 (341); 6 Am. 240. To the same effect is Hefner v. Vandolah, 62 Ill 483, 14 Am. 106; Fitzpatrick v. School Commissioners, 7 Hump. 224, 46 Am. Dec. 76.

There are other cases which, while seeming to lend support to the doctrine that a forged signature may be ratified, nevertheless turn upon the proposition that the holder of the note had in some way acted in reliance upon the promise or admission of the person whose name appeared on the note, or that the latter had received or participated in the consideration for which the note had been given, and was therefore estopped to deny the genuineness of his signature. Still other decisions depend upon principles which distinguish them from cases involving the doctrine of ratification or adoption of forged instruments purely. Casco Bank v. Keene, 53 Me. 103; Forsyth v. Day, 46 *id.* 176; Corser v. Paul, 41 N. H. 25, 77 Am. Dec. 753; Woodruff v. Monroe, 33 Md. 146; Union Bank v. Middlebrook, 33 Conn. 95; Livings v. Wiler, 32 Ill. 387; Commercial Bank v. Warren, 15 N. Y. 577; Crout v. DeWolf, 1 R. I. 393; McKenzie v. British Linen Co., L. R. 6 App. Cas. 82; Forsyth v. Banta, 5 Bush. 548.

It is a well established rule of law that if one, not assuming to act for himself, does an act for or in the name of another upon an assumption of authority to act as the agent of the latter, even though without any precedent authority whatever, if the person in whose name the act was performed subsequently ratifies or adopts what has been so done, the ratification relates back and supplies original authority to do the act. In such a case the principal is bound to the same extent as if the act had been done in the first instance by his previous authority, and this is so whether the act be detrimental to the principal or to his advantage, or whether it be founded in tort or contract. The reason is, that there was an open assumption to act as the agent of the party who subsequently adopted the act. The agency having been knowingly ratified, the ratification becomes equivalent to original authority. Wilson v. Tumman, 6 Man. & V. 236; Smith v. Tramel, 68 Iowa 488. So, if a contract be voidable on account of fraud practised on one party, or if for any reason it might be avoided, yet if the party having the right to avoid the contract, being fully informed, deliberately confirms or ratifies it, even though this be done without a new consideration, and after acts have been done which would have released the person affected, the party thus ratifying is thereby precluded from obtaining the relief he otherwise might have had. Williams v. Boyd, 75 Ind. 286.

The ratification or adoption of a forged instrument or of a contract which is prohibited by law or made in violation of a criminal statute involves altogether different principles. One who commits the crime of forgery by signing the name of another to a promissory note does not assume to act as the agent of the person whose name is forged. Upon principle there would seem to be no room to apply the doctrine of ratification or adoption of the act in such a case. Where the act done constitutes a crime and is committed without any pretense of authority it is different to understand how one who is in a sense the victim of the criminal act may adopt or ratify it, so as to become bound by a contract to which he is to all intent and purposes a stranger, and which as to him was conceived in a crime and is totally without consideration. As has been well said, it is impossible in such a case to attribute any motive to the ratifying party but that of concealing the crime and suppressing the prosecution: "For why should a man pay money without consideration when he himself had been wronged, unless constrained by a desire to shield the guilty party?"

The distinction made in many well-considered cases seems to be this: Where the act of signing constitutes the crime of forgery, while the person whose name has been forged may be estopped by his admissions, upon which others may have changed their relations, from pleading the truth of the matter to their detriment, the act from which the crime springs cannot, upon considerations of public

policy, be ratified without a new consideration to support it. Shisler v. Vandike, 92 Pa. St. 447, 37 Am. R. 702; McHugh v. County of Schuylkill, 67 Pa. St. 391, 5 Am. R. 445; Workman v. Wright, 33 Ohio St. 405, 31 Am. 546, and note; Owsley v. Philips, 78 Ky. 517; Brooke v. Hook, 24 L. T. 34 (3 Alb. Law Jour. 255). 2 Daniel on Negotiable Instruments, 1351, 1353; 2 Randolph on Commercial Paper, § 629.

In case of a known or conceded forgery, we are unable to discover any principle upon which subsequent promise by the person whose name was forged can be held binding in the absence of an estoppel *in pais,* or without a new consideration for the promise; Workman v. Wright, *supra;* Owsley v. Philips, *supra.*

Notwithstanding the elaborate argument of counsel, our conclusion is that neither the reply nor the instructions as applied to the evidence in the case before us presents the question of the ratification of a forged instrument.

The case was contested upon the one side on the theory that the signature to the note was the appellant's genuine signature. There was no question of forgery involved in the case. There was no evidence pointing to the crime of forgery on the part of anyone. The question was whether the note had been signed by the appellant, or by someone duly authorized by him. For anything that appears either in the reply or in the evidence, it may as well be assumed, if the appellant's name was not signed by himself that it was signed by another under pretense of authority.

As we have seen, if the appellant's name was signed by someone who assumed to act as his agent, or under pretense or color of authority, ratification, understandingly, either by an express promise to pay, or by accepting a chattel mortgage as indemnity, would be equivalent to previous authority.

The ratification which the law interdicts relates only to such acts as clearly appear to have been done in violation of a criminal statute, the motive of the ratifying party being presumably the concealment of the crime or the suppression of its prosecution. Where, however, as in the present case, the act ratified is of an ambiguous character, and may as well be attributed to a mistaken assumption of authority as to a purpose to commit a crime, public policy does not forbid the adoption or ratification of the act; nor can it be said to be without consideration, especially where, as in the present case, indemnity has been accepted.

These conclusions lead to an affirmance of the judgment.

Judgment affirmed with costs.

WELLINGTON and Others v. JACKSON.

1876. Supreme Judicial Court of Massachusetts.
121 Mass. 157.

Contract, against the maker of a promissory note. Answer, a denial that the defendant made the note.[1] * * *

The presiding judge instructed the jury as follows: "If, upon the whole evidence in the case, the jury shall be satisfied that the defendant, knowing that his signature was forged, by his words, acts or silence, gave the plaintiffs to understand that it was not forged, but was a genuine signature, intending thereby to cause the plaintiffs to rely on the note as his note, and the plaintiffs did so rely and act upon it, and were injured thereby, the defendant would be estopped to deny that his name was not a genuine signature and that it was not put there by him or by his authority."

The counsel for the assignee asked the judge to give these instructions: "1. Estoppels are not favored in law, because they operate to shut out the truth, and to prevent parties from asserting or defending their rights by proof of actual existing facts. 2. There must be shown a wilful intent to induce the party to act on the faith of the alleged statements or representations, in addition to the fact that such statements were acted upon."

The judge gave the second instruction, as comprised substantially in the instructions already given, but declined to give the first.

The judge stated to the jury that if they found their verdict for the plaintiffs, he should inquire of them whether they found it on the ground that the defendant executed the note, or the ground of estoppel, the jury found for the plaintiffs, and answered in writing that they found on the ground that the defendant had "acknowledged the signature to the note."

The defendant then filed a motion for a new trial; but the judge overruled the motion, on the ground that it appeared, by the special finding of the jury, that they did not find for the plaintiffs on the ground of estoppel, but on the ground that the defendant had acknowledged the signature of the note to be his; and being of the opinion that upon that ground the verdict was not against the weight of evidence.

To the above rulings and refusals to rule the assignee alleged exceptions.

Gray, C. J.—Although the signature of Edward H. Jackson was forged, yet if, knowing all the circumstances as to that signature and intending to be bound by it, he acknowledged the signature and thus assumed the note as his own, it would bind him, just as if it had been originally signed by his authority, even if it did not

[1] A portion of the reporter's statement of facts is omitted.

assume to an excepted or [illegible] Greenleaf [illegible] Wade, 2 Allen 443; Bigelow v. Tucker, 102 Mass. 240, [illegible] [illegible] of the jury to the question of the court above that [illegible] for the plaintiff upon this ground, and exceptions [illegible] instructions given or requested upon the subject [illegible]

DEMPSEY v. CHAMBERS

Oct. Supreme Judicial Court of Massachusetts.
154 Mass. 330.

Holmes, J. — This is an action of tort to recover damages for the breaking of a plate-glass window. The glass was broken by the negligence of one McCulloch, while delivering coal which had been ordered of the defendant by the plaintiff. It is found as a fact that McCulloch was not the defendant's servant when he broke the window, but that the "delivery of the coal by McCulloch was ratified by the defendant, and that such ratification made McCulloch in law the agent and servant of the defendant in the delivery of the coal." On this finding the court ruled "that the defendant, by the ratification of the delivery of the coal by McCulloch became responsible for his negligence in the delivery of the coal." The defendant excepted to this ruling, and to nothing else. We must assume that the finding was warranted by the evidence, in spite of the copious dicta of opinion that the fact of [illegible] [illegible] [illegible] to set forth all the evidence on which [illegible] [illegible] Therefore the only question before us is [illegible] [illegible] of the ruling just stated.

[illegible] [illegible] [illegible] [

WILLIAMSON and Others v. JACKSON.

1891. Supreme Judicial Court of Massachusetts.

Contract; [illegible] a promissory note. Answer, a denial that [illegible]

The [illegible] charge requested [illegible] as follows: "If, upon the whole evidence, [illegible] will be satisfied that the defendant knowing that his signature was forged by his words, acts or [illegible] authority or understanding that it was not forged, [illegible] intending thereby to cause the plaintiffs to [illegible] on the note, and the plaintiffs did so rely upon [illegible] and were injured thereby, the defendant would be [illegible] from setting up that the [illegible] was not a genuine signature and [illegible] him or by his authority."

[illegible] asked the judge to give these instructions [illegible] are not favored in law because they [illegible] and to prevent parties from asserting [illegible] by proof of [illegible] facts. [illegible] intent to induce the party to act on [illegible] misrepresentations, in addition [illegible] were given.

[illegible] instructions as requested substantially [illegible] declined to give the [illegible]

[illegible] that if they found their verdict for [illegible] reasons or upon whether they found it on the [illegible] the [illegible] or the ground of [illegible] for the plaintiffs and answered in writing the [illegible] on the ground that the defendant had "acknowledged [illegible]"

The [illegible] a motion for a new trial; but the judge overruled the motion, ruling that it appeared, by the special finding of [illegible] did not find for the plaintiff on the ground of [illegible] ground that the defendant had acknowledged [illegible] and being of the opinion that upon [illegible] was not against the weight of evidence.

To the above [illegible] the defendant alleged exceptions.

Isaac C. J. [illegible] the signature of Edward H. Jackson was forged, yet if, [illegible] the circumstances as to that signature and [illegible] he [illegible] the signature and thus assumed the responsibility, it would bind him, just as if it had been originally [illegible] by his authority, even if it did not

A motion for rehearing was [illegible]

amount to an estoppel *in pais*. Greenfield Bank v. Crafts, 4 Allen 447; Bartlett v. Tucker, 104 Mass. 336, 341. The answer of the jury to the question of the court shows that they found for the plaintiffs upon this ground, and renders immaterial the instructions given or requested upon the subject of estoppel.[1] * * *[2]

DEMPSEY v. CHAMBERS.

1891. Supreme Judicial Court of Massachusetts.
154 Mass. 330.

Holmes, J.—This is an action of tort to recover damages for the breaking of a plate-glass window. The glass was broken by the negligence of one McCullock, while delivering some coal which had been ordered of the defendant by the plaintiff. It is found as a fact that McCullock was not the defendant's servant when he broke the window, but that the "delivery of the coal by McCullock was ratified by the defendant, and that such ratification made McCullock in law the agent and servant of the defendant in the delivery of the coal." On this finding the court ruled "that the defendant, by his ratification of the delivery of the coal by McCullock became responsible for his negligence in the delivery of the coal." The defendant excepted to this ruling, and to nothing else. We must assume that the finding was warranted by the evidence, a majority of the court being of opinion that the bill of exceptions does not purport to set forth all the evidence on which the finding was made. Therefore, the only question before us is as to the correctness of the ruling just stated.

If we were contriving a new code to-day, we might hesitate to say that a man could make himself a party to a bare tort, in any case, merely by assenting to it after it had been committed. But we are not at liberty to refuse to carry out to its consequences any principle which we believe to have been part of the common law, simply because the grounds of policy on which it must be justified seem to us to be hard to find, and probably to have belonged to a different state of society.

It is hard to explain why a master is liable to the extent that he is for the negligent acts of one who at the time really is his servant,

[1] A portion of the opinion dealing with a question of bankruptcy is omitted.

[2] The following cases hold that a forgery can be ratified: Greenfield Bank v. Crafts, 4 Allen (Mass.) 447; Howard v. Duncan, 3 Lans. 174; Central National Bank v. Copp, 184 Mass. 328.

acting within the general scope of his employment. Probably master and servant are "fained to be all one person" by a fiction which is an echo of the *patria potestas* and of the English frank pledge. Byington v. Simpson, 134 Mass. 169, 170. Fitz. Abr. Corone, pl. 428. Possibly the doctrine of ratification is another aspect of the same tradition. The requirement that the act should be done in the name of the ratifying party looks that way. New England Dredging Co. v. Rockport Granite Co., 149 Mass. 381, 382; Fuller & Trimwell's Case, 2 Leon. 215, 216, Sext. Dec. 512, De. Reg. Jur., Reg. 9, D. 43, 26, 13 D. 43, 16, 1, § 14, gloss. See also cases next cited.

The earliest instances of liability by way of ratification in the English law, so far as we have noticed, were where a man retained property acquired through the wrongful act of another. Y. B. 30, ed. 1, 128 (Rolls ed.), 38 Lib. Ass. 223, pl. 9; S. C. 38 ed. III. 18, Engettement de Garde. See Plowd, 8 ad fin., 27, 31; Bract. fol. 158 b, 159a, 171b; 12 ed. IV 9, pl. 23. But in these cases the defendant's assent was treated as relating back to the original act, and at an early date the doctrine of relation was carried so far as to hold that, where a trespass would have been justified if it had been done by the authority by which it purported to have been done, a subsequent ratification might justify it also. Y. B. 7 Hen. IV 34, pl. 1. This decision is qualified in Fitz. Abr. Bayllye, pl. 4, and doubted in Bro. Abr. Trespass, pl. 86; but it has been followed or approved so continuously and in so many later cases, that it would be hard to deny that the common law was as there stated by Chief Justice Gascoigne. Godbolt 109, 110, pl. 129; S. C. 2 Leon. 196, pl. 246; Hull v. Pickersgill, 1 Brod. & Bing. 282; Muskett v. Drummond, 10 B. & C. 153, 157; Buron v. Denman, 2 Exch. 167, 188; Secretary of state in council of India v. Kamachee Boye Sahaba, 13 Moore P. C. 22, 86; Cheetham v. Mayor of Manchester, L. R. 10 C. P. 249; Wiggins v. United States, 3 Ct. of Cl. 412.

If we assume that an alleged principal by adopting an act which was unlawful when done can make it lawful, it follows that he adopts it at his peril, and is liable if it should turn out that his previous command would not have justified the act. It never has been doubted that a man's subsequent agreement to a trespass done in his name and for his benefit amounts to a command so far as to make him answerable. The *ratihabitio manda to comparatur* of the Roman lawyers and the earlier cases (D. 46, 3, 12, § 4; D. 43, 16, 1, § 14; Y. B. 30, ed. 1, 128) has been changed to the dogma *æquiparatur* ever since the days of Lord Coke. 4 Inst. 317. See Bro. Abr. Trespass, pl. 113; Co. Lit. 207a; Wingate's Maxims, 124; Com. Dig. Trespass, C. 1; Eastern Counties Railway v. Broom. 6 Exch. 314, 326, 327; and cases hereafter cited.

Doubts have been expressed, which we need not consider, whether this doctrine applied to the case of a bare personal tort. Adams v. Freeman, 9 Johns. 117, 118. Anderson and Warberton, J. J., in

Bishop v. Montague, Cro. Eliz. 824. If a man assaulted another in the street out of his own head, it would seem rather strong to say that, if he merely called himself my servant, and I afterwards assented, without more, our mere words would make me a party to the assault, although in such cases the canon law excommunicated the principal if the assault was upon a clerk. Sext. Dec. 5, 11, 23. Perhaps the application of the doctrine would be avoided on the ground that the facts did not show an act done for the defendant's benefit. Wilson v. Barker, 1 Nev. & Man. 409; S. C. 4, B. & Ad. 614, *et seq.;* Smith v. Lozo, 42 Mich. 6. As in other cases it has been on the ground that they did not amount to such a ratification as was necessary. Tucker v. Jerris, 75 Maine 184; Hyde v. Cooper, 26 Vt. 552.

But the language generally used by judges and text writers, and such decisions as we have been able to find, is broad enough to cover a case like the present when the ratification is established. Perley v. Georgetown, 7 Gray 464; Bishop v. Montague, Cro. Eliz. 824; Sanderson v. Baker, 2 Bl. 832; S. C. 3 Wils. 309; Barker v. Braham, 2 Bl. 866, 868; S. C. 3 Wils. 368; Badkin v. Powell, Cowper, 476, 479; Wilson v. Tumman, 6 Man. & G. 236, 242; Lewis v. Read, 13 M. & W. 834; Buron v. Denman, 2 Exch. 167, 188; Bird v. Brown, 4 Exch. 786, 799; Eastern Counties Railway v. Broom, 6 Exch. 314, 326, 327; Roe v. Birkenhead, Lancashire & Cheshire Junction Railway, 7 Exch. 36, 41; Ancona v. Marks, 7 H. & N. 686, 695; Condit v. Baldwin, 21 N. Y. 219, 225; Exum v. Brister, 35 Miss. 391; Galveston, Harrisburg & San Antonio Railway v. Donahoe, 56 Texas, 162. Murray v. Lovejoy, 2 Cliff. 191, 195; see Lovejoy v. Murray, 3 Wall. 1, 9; Story on Agency, §§ 455, 456.

The question remains whether the ratification is established. As we understand the bill of exceptions, McCullock took on himself to deliver the defendant's coal for his benefit and as his servant, and the defendant afterwards assented to McCullock's assumption. The ratification was not directed specifically to McCullock's trespass, and that act was not for the defendant's benefit if taken by itself, but it was so connected with McCullock's employment that the defendant would have been liable as master if McCullock really had been his servant when delivering the coal. We have found hardly anything in the books dealing with the precise case, but we are of opinion that consistency with the whole course of authority requires us to hold that the defendant's ratification of the employment established the relation of master and servant from the beginning, with all its incidents, including the anomalous liability for his negligent acts. See Coomes v. Houghton, 102 Mass. 211, 213, 214; Cooley Torts 128, 129. The ratification goes to the relation, and establishes it *ab initio.* The relation existing, the master is answerable for torts which he has not ratified specifically, just as he is for those which he has not commanded, and as he may be for those which he has expressly forbidden. In Gibson's Case, Lane 90, it was agreed that, if strangers as servants

to Gibson, but without his precedent appointment, had seized goods by color of his office and afterwards had misused the goods, and Gibson ratified the seizure, he thereby became a trespasser *ab initio,* although not privy to the misusing which made him so. And this proposition is stated as law in Com. Dig. Trespass, c. 1; Elder v. Bemis, 2 Met. 599, 605. In Coomes v. Houghton, 102 Mass. 211, the alleged servant did not profess to act as servant to the defendant, and the decision was that a subsequent payment for his work by the defendant would not make him one. For these reasons, in the opinion of a majority of the court, the exceptions must be overruled.

Exceptions overruled.[1]

Section 2.—Requisites of Ratification.

TRUEBLOOD v. TRUEBLOOD.

1856. Supreme Court of Indiana. 8 Ind. 195.

Perkins, J.—Bill in chancery, under the old practice, to compel a specific performance, and to set aside a fraudulent deed. Bill dismissed. The facts of the case, so far as material to its decision, are as follows:

In 1845 William Trueblood was an infant, and owner of a piece of land. At that date Richard J. Trueblood, the father of said William, executed a title-bond to one Nathan Trueblood, whereby he obligated himself to cause to be conveyed to him, said Nathan, the piece of land belonging to William, after the latter should become of age. The conveyance was to be upon a stated consideration. The bond is single, simply the bond of Richard, and William is nowhere mentioned in it as a party, but his name is signed with his father's at the close of the condition, as may be supposed, in signification of his assent to the execution of the instrument by his father. We shall so treat his signature to the bond.

After William became of age, it is claimed that he ratified the bond,

[1] "He that receiveth a trespasser and agreeth to a trespass after it be done, is no trespasser, unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a commandment; for in that case, *omnis ratihabitio retrotrahitur, et mandato æquiparatur.*" 4 Co. Inst. 317.

"Chief Justice Tindall, in Wilson v. Tumman, 6 Man. & Gr. (46 Eng. C. L. R.) 236, states the rule more fully thus: 'That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or advantage, and whether it be founded on a tort or a contract, to the same extent as by and with all the consequences which follow from the same act done by his previous authority.'" Burks, J., in Forbes v. Hagman, 75 Va. 168, 178.

and afterwards sold and conveyed the land to persons. Robert Lockridge, who had notice, etc. That he had caused a deed to have the deed to Lockridge set aside, and a conveyance executed to Nathan Trueblood, pursuant to the terms of the bond.

The court below, as we have stated, refused to grant the relief sought, and held, as counsel inform us, that the bond was not susceptible of ratification by William Trueblood; and whether it was or not was the important question in the case. As the bond was not executed in such manner, we need not inquire into the alleged facts which it is claimed constitute evidence that such act has been done. As we have said, the bond is not in terms the bond of William Trueblood. He could not, by virtue of its express provisions, be sued upon it. Where a father signs his name to articles of apprenticeship of his son, simply to signify his assent to them, he cannot be a party to a suit upon the articles. Brock v. Parker, 5 Ind. 538.

If the bond, then, can in any light be regarded as the contract of William Trueblood, it must be because his father may be considered his agent in executing it. Can, then, an infant, after arriving at age, ratify the act of his agent performed while he was an infant? This depends upon whether his appointment of an agent is a void or voidable act. If the former, it cannot be ratified (State v. State Bank, 5 Ind. 339); if the latter, it can be (Reeve's Dom. Rel. 240).

In the first volume of American Leading Cases (3d ed.), 348, *et seq.*, the doctrine is laid down, as the result of the American cases on the subject, that the only act an infant is incapable of performing as to contracts is the appointment of an agent or attorney. Whether the doctrine is founded in solid reasons, they admit, may be doubted; but assert that there is no doubt but that it is the law. See the cases there collected.

The law seems to be held the same in England. In Dyer's Reports, 30 H. 8 W. 378, a case slightly like the present in some respects, the attorney to a grantor said: "Here a fine may not be executed either by the children or by Hugh Thomas acting as their attorney." Fyche, W., replied: "That is the fallacy of your argument, for appointment by an agent cannot bind an infant. If an infant appoints a person to make a lease, it does not bind the infant unless his performance bind him. There is no doubt about the law that the act of an infant, to be good, must be his own personal act. . . . Even had the bond been the personal act of the infant, he could have avoided it by several acts, been simply voidable. But the bond being given by an agent assumed to act as such, is void, and not capable of being ratified. See Olmstead v. Watts, 8 Blackf. 135.

The decree below must, therefore, be affirmed, with costs.

[1] A contract made without authority by another in behalf of an infant may be ratified by him after coming of age. Whitney v. Dutch, 14 Mass. 457; Kline v. Baker, 99 U. S. 36 [1878].

to Gibson, but without his precedent appointment, had seized goods by color of his office and afterwards had restored the goods, and Gibson ratified the seizure, he thereby became a trespasser *ab initio*, although not privy to the misdoing which made him so. And this proposition is stated as law in Com. Dig. Trespass, c. 1; Elder v. Pemis, 2 Met. 205, 209. In Barnes v. Houghton, 102 Mass. 211, the alleged servant did not profess to act as servant to the defendant, and the decision was that a subsequent payment for his work by the defendant would not make him so. For these reasons, in the opinion of a majority of the court, the exceptions must be overruled.

Exceptions sustained.

Section 8.—Requisites of Ratification.

TRUEBLOOD v. TRUEBLOOD.

Supreme Court of Indiana. 8 Ind. 195.

Trespass to recover damages, under the old practice, to compel a specific performance of and to set aside a fraudulent deed. Bill dismissed. The facts of the case, so far as material to its decision, are stated in the opinion.

A. Hendricks and W. Wallace, for appellant.

J. Truebloood, for appellee.

By the Court, Perkins, J. Nathan Trueblood, an infant, and owner of a piece of land, by his father and next friend, J. Trueblood, the father of said William, executed a bond to said William, whereby he obligated himself to convey to him, when he should arrive at the age of twenty-one years, the piece of land described in the bond, provided the latter should become of age. The consideration of the bond was stated to be love and affection for a stated consideration. The bond is single, signed by Nathan, Richard, and William is nowhere mentioned in it as a party. The name is signed with his father's at the close of the instrument, as may be supposed, in signification of his assent to the execution of the instrument by his father. We shall so treat his signature in the case.

After William became of age, he claimed that he ratified the bond,

[illegible] "A man cannot make a thing that is void to a purpose after it be done to no purpose, unless the same was done by his own act or for his benefit, and then his agreement [illegible] is a commandment; for in [illegible] cases [illegible] precedent." 4 Co. Inst. 27.

Chief Justice Tindal, [illegible] Bing. N. Cas. 546 Eng. C. L. R.: "[illegible] the old rule that [illegible] one another by a person not assuming to act [illegible] such other person, though [illegible] any precedent authority, because one act on the principal [illegible] subsequently ratified by him, [illegible] and well-established rule of law, to our case the principal [illegible] the act [illegible] at the time, in derogation of a stranger, and whether [illegible] considered as a tort or a contract, to the same extent as by and with [illegible] authority from the outset [illegible] done by his previous [illegible]." Metcalf, J., in Perley v. Hapgood, 75 Mass. 565, 578.

and afterwards sold and conveyed the land to another, Robert Lockridge, who had notice, etc. This bill was filed in order to have the deed to Lockridge set aside, and a conveyance decreed to Nathan Trueblood, pursuant to the terms of the bond.

The court below, as we have stated, refused to enter such a decree, and held, as council inform us, that the bond was not susceptible of ratification by William Trueblood; and whether it was or not is the important question in the case; for if the bond was not susceptible of such ratification, we need not inquire into the alleged facts which it is claimed evidence that such an act had been done. As we have seen, the bond is not in terms the bond of William Trueblood. He could not, by virtue of its express provisions, be sued upon it. Where a father signs his name to articles of apprenticeship of his son, simply to signify his assent to them, he cannot be a party to a suit upon the articles. Brock v. Parker, 5 Ind. 538.

If the bond, then, can in any light be regarded as the contract of William Trueblood, it must be because his father may be considered his agent in executing it. Can, then, an infant, after arriving at age, ratify the act of his agent, performed while he was an infant? This depends upon whether his appointment of an agent is a void or voidable act. If the former, it cannot be ratified (State v. State Bank, 5 Ind. 353); if the latter, it can be (Reeve's Dom. Rel. 240).

In the first volume of American Leading Cases (3d ed.), 248, *et seq.*, the doctrine is laid down, as the result of the American cases on the subject, that the only act an infant is incapable of performing as to contracts is the appointment of an agent or attorney. Whether the doctrine is founded in solid reasons, they admit, may be doubted; but assert that there is no doubt but that it is the law. See the cases there collected.

The law seems to be held the same in England. In Doe v. Roberts, 16 M. & W. 778, a case slightly like the present in some respects, the attorney in argument said: "Here a tenancy has been created, either by the children, or by Hugh Thomas acting as their agent." Parke, B., replied: "That is the fallacy of your argument. An agreement by an agent cannot bind an infant. If an infant appoints a person to make a lease, it does not bind the infant, neither does his ratification bind him. There is no doubt about the law; the lease of an infant, to be good, must be his own personal act." So here, had the bond been the personal act of the infant, he could have ratified it. It would have been simply voidable. But the bond of his agent, or one having assumed to act as such, is void, and not capable of being ratified. See Hiestand v. Kuns, 8 Blackf. 345.

The decree below must, therefore, be affirmed with costs.[1]

[1] A contract made without authority by another for an infant may be ratified by him after coming of age. Whitney v. Dutch, 14 Mass. 457. *Contra:* Armitage v. Widoe, 36 Mich. 124.

STETSON v. PATTEN et al.

1823. Supreme Judicial Court of Maine. 2 Greenl. 358.

This was an action of covenant upon an agreement under seal, signed by the defendant, and by "Simeon Stetson for Amasa Stetson" the plaintiff, by which the defendants agreed to enter upon certain unimproved lands for the plaintiff in the plantation of Stetson in this county, and make two farms thereof, and pay certain moneys to the plaintiff with interest annually; in consideration whereof the plaintiff was to make, execute and deliver to them a sufficient warranty deed of the same lots. In the instrument declared on, the said Simeon was not named, except in the signature as above, but the covenants were wholly in the name of the plaintiff.

In a case stated by the parties it was agreed that said Simeon had not any authority under the hand and seal of the plaintiff to sign and seal the instrument declared on; but that living in the vicinity of the plaintiff's lands in this county, he had been requested by the plaintiff, who is his brother, to superintend and manage his interests relative to said estate;—and that pursuant to this request he made and executed the deed declared on, in behalf of the plaintiff, who resides in Massachusetts, and which he afterwards delivered to the plaintiff. It was further agreed that another deed of the same tenor and date was made and delivered to the defendants, who in pursuance of the agreement, entered and made improvements upon the land; and that about three years after the date of the agreement they settled an account with the plaintiff, and applied a balance due to them on account toward the payment of the interest due on said agreement, which the plaintiff accordingly endorsed thereon.

Hereupon the question was whether the plaintiff was bound by this agreement,—and if not, whether it was obligatory on the defendants?

Mellen, C. J., delivered the opinion of the court.

It is agreed that Simeon Stetson had not any authority under the hand and seal of the plaintiff, to execute the instrument declared on; and it therefore was not the deed of Amasa Stetson. No authorities need be cited to shew that when an instrument under seal is executed by attorney, the attorney must be authorized by deed under the hand and seal of the principal. This is admitted by the counsel for the plaintiff, but he contends that in consequence of certain acts which have been done by the principal since the execution of the instrument, it has been sanctioned and adopted by him, and thereby has become his deed. The circumstances relied on as proof of such ratification are, his acceptance of the indenture from the hands of his brother after its execution, and the endorsement on the back of the instrument of money received from the defendants on account of the contract. With respect to these facts, they cannot amount to anything

[illegible]

HAWKINS v. [illegible]

[illegible] Supreme Court of Wisconsin. [illegible]

Dower. 1.—By an act approved March 19, 1858, the statute of "frauds and perjuries" (§ 2613, Revised Statutes 1858) was amended by adding the following clause to that section: "And no contract for the sale of lands made by an agent shall be binding upon the principal unless such agent is authorized in writing to make said contract." This is an action in the nature of a bill in equity to specifically enforce the written contract of an agent in the name of his principal for a sale of land made by the agent, not within the terms of such agent's written authority, upon the ground of a verbal ratification of such sale by the principal after he was informed thereof. In the light of the case there is no ground of equitable relief. Plaintiff's evidence proved at most only to prove that the defendant when informed by [illegible] of the sale did not manifest to the agent any disapprobation thereof, but directly thereafter said to another person:

The trial court ruled that the written authority must continue [illegible] to make the contract which he does make, in order to bind the principal, and unless it does so any ratification thereof must be in writing to bind him, citing, [illegible] Agency (2d ed.) [illegible] and Dezendorf, Lime v. Mfg. Co., 12 N. H. 295, in which [illegible] that "a ratification of an act done by one assuming to act as agent cannot make that act operative as a prior authority. [illegible] the absence of any particular form or mode is necessary to evince the assent to the first instance [illegible] can be no valid ratification of the same nature."

At common law, where a contract is required to be under seal a ratification must also be under seal. 1 Am. & Eng. Ency. Law, 1001; Story on Agency, § 50, and authorities in note 1; Mechem on Agency, § 137, and authorities in note 6, same page. And some statutes [illegible]

[illegible]

[illegible]

STETSON v. PATTEN ET AL.

(See 2 Dallas' Supreme Court of Mass., 2 Gresol. 338.)

This was an action of [illegible] upon an agreement under seal, signed by the defendants and by Simeon Stetson for Amasa Stetson the plaintiff, by which the defendants agreed to enter upon certain unimproved land [illegible] of the plaintiff in the plantation of Stetson in this county, and make [illegible] thereof, and pay certain moneys to the plaintiff [illegible], in consideration whereof the plaintiff was to [illegible] deliver to them a sufficient warranty deed of the same land. The instrument declared on the said Simeon did not [illegible] the signature as above, but the covenants were [illegible] the plaintiff.

To a [illegible] it was agreed that said Simeon had not [illegible] the hand and seal of the plaintiff to sign and [illegible] declared on, but that living in the vicinity of the [illegible] county, he had been requested by the [illegible] to superintend and transact his interests [illegible] that pursuant to this request he made and [illegible] on behalf of the plaintiff, who resides [illegible] he afterwards conveyed to the plaintiff. [illegible] another deed of the same tenor and date [illegible] the defendants, who in pursuance of the [illegible] improvements upon the land; and that [illegible] of the agreement they settled an account [illegible] plaintiff supplied a balance due to them on account [illegible] due on said agreement, which the plaintiff [illegible] Stetson.

[illegible] whether the plaintiff was bound by this agreement, [illegible] it was obligatory on the defendants?

Sedgwick, C. J. delivered the opinion of the court.

It is agreed that Simeon Stetson had not any authority under the hand and seal of [illegible] to execute the instrument declared on; and therefore we [illegible] of Amasa Stetson. No authorities [illegible] to show that [illegible] instrument under seal is executed by attorney, the attorney [illegible] authorized by deed under the hand and seal of the principal. The [illegible] by the counsel for the plaintiff [illegible] the ratification [illegible] of certain acts which have been done by the [illegible] since the execution of the instrument, it has been sanctioned [illegible] and thereby has become his deed. The [illegible] relied on [illegible] of such ratification are, the acceptance of [illegible] from the hands of his brother Abel [illegible], and the indorsement on the back of the instrument of money received [illegible] on account of the contract. With respect to these facts, they cannot amount to anything

more than a sanction and ratification made by parol; and such ratification could not be more availing than a parol authority given before the instrument was signed, which, as we have seen, is of no importance. The plaintiff therefore cannot prevail on this ground. * * *

Nonsuit entered.[1]

HAWKINS v. McGROARTY et al.

1892. Supreme Court of Missouri. 110 Mo. 546.

Brace, J.—By an act approved March 19, 1897, the statute of "frauds and perjuries," § 2513 Revised Statutes 1879, was amended by adding the following clause to that section: "And no contract for the sale of lands made by an agent shall be binding upon the principal unless such agent is authorized in writing to make said contract." This is an action in the nature of a bill in equity to specially enforce the written contract of an agent in the name of his principal for a sale of land made by the agent, not within the terms of such agent's written authority, upon the ground of a verbal ratification of such sale by the principal after he was informed thereof. In the facts of the case there is no element of equitable estoppel. Plaintiff's evidence tended at most only to prove that the defendant when informed by letter of the sale, did not manifest to the agent any disapprobation thereof, but directly thereafter sold to another person.

The trial court ruled that the written authority must authorize the agent to make the contract which he does make, in order to bind the principal, and unless it does so the ratification thereof must be in writing to bind him, citing Story on Agency (9th ed.), § 242, and Despatch Line v. Mfg. Co., 12 N. H. 205, in which it was held that "a ratification of an act done by one assuming to be agent relates back, and is equivalent to a prior authority. When, therefore, the adoption of any particular form or mode is necessary to confer the authority in the first instance, there can be no valid ratification except in the same manner."

At common law, where a contract is required to be under seal a ratification must also be under seal. 1 Am. & Eng. Ency. Law 436; Story on Agency, § 49, and authorities in note 3; Mechem on Agency, § 137, and authorities in note 6, same page. And upon the same prin-

[1] *Accord:* Blood v. Goodrich, 9 Wend. (N. Y.) 68; Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205.

The Massachusetts rule is that the unauthorized execution of a sealed instrument can be ratified by parol. Cady v. Shepherd, 11 Pick. (Mass.) 400; McIntyre v. Park, 11 Gray (Mass.) 102.

Regarding ratification by partnership of a deed executed by one partner without authority, see McDonald v. Eggleston, 26 Vt. 154.

ciple the last author, stating the general rule says, "If, therefore, sealed authority was indispensable, sealed ratification must be shown; and if written authority was required, written ratification must appear." § 136.

In Pollard & Co. v. Gibbs, 55 Ga. 45, it was held that "where a crop lien for fertilizers is executed by an agent who acts without authority from the principal, and in his absence, and the lien is under seal, proof of the ratification by the principal must be in writing and under seal."

In Ragan v. Chenault, 78 Ky. 546, under a statute which provided that "no person shall be bound as the surety of another by the act of an agent, unless the authority of the agent is in writing, signed by the principal;" it was held that subsequent verbal ratification would not bind the surety; that to so hold would be to defeat the object of the statute.

In Palmer v. Williams, 24 Mich. 328, under a statute of frauds, the same as our own, before the adoption of the amendment set out, it was held that "ratification, if not made in writing, with due knowledge of the circumstances, could only be made out by such conduct on the part of the principal as would equitably estop him from insisting on his rights. And such an estoppel would not be made out unless defendants had been so far misled by him to their own prejudice, that justice demanded their protection against him. * * * In the absence of any conduct designed or calculated to mislead, mere delay will not deprive an owner of his estate, legal or equitable, until barred by some clear rule of equity."

There is no such bar in the facts of this case. Hiemans was authorized in writing by the defendant Maull to sell his property for $1,400. On the ninth of July he sold to plaintiff for $1,300, who paid Hiemans $40 earnest money, and received from him a receipt for that amount on acount of the sale. Hiemans says he immediately wrote Maull a letter, and that Maull called the next day, when he explained the sale to him and he manifested no disapprobation. Maull sold to his co-defendant, McGroarty, on the evening of the eleventh. He testifies that he did not see Hiemans until after this sale, and did not receive his letter until the evening of the day he sold to McGroarty, and did not understand from its contents that his agent had actually effected a sale. However the truth of this matter may be, he never received from his agent the earnest money of the plaintiff; in a day or two, took the check he received from McGroarty for $50, paid by him as earnest money, to Hiemans (who collected it), and directed conveyances to be prepared to McGroarty, which was accordingly done, the balance of the purchase money paid, and the deeds delivered on the twenty-second of July. In the meantime he never, by any act or word of his, gave the plaintiff to understand for a moment that he had authorized or ratified the sale made by Hiemans to him; but from the first approach to him, made by the plaintiff, to

secure a performance of the contract, steadily refused to recognize, ratify or confirm the same.

Under the statute, as it now reads, requiring written authority for the contract which the agents make, there can be no question, it would seem, that there is no such ratification here as could, by any process of reasoning, bind the defendant Maull to specifically perform the contract in question, which his agent Hiemans had no written authority to make.

The judgment is affirmed. All concur.[1]

COMBS v. SCOTT and others.

1866. Supreme Judicial Court of Massachusetts. 12 Allen 493.

Contract, brought to recover the price agreed to be paid to the plaintiff for his services in obtaining two recruits and securing their enlistment in the military service of the United States, as a part of the quota of the town of Hawley.

At the trial in the superior court, before Lord, J., the plaintiff introduced evidence tending to show that in August, 1864, the defendants had charge of a fund committed to them for the purpose of obtaining recruits for said town in such service, and that they were engaged in that work and employed one Dunton as their agent, who was authorized by them to employ the plaintiff in their behalf, and did so employ him, agreeing to pay $550 for each recruit that he should obtain to the number of two or three; and that, if no previous authority had been given to Dunton to employ the plaintiff in their behalf, they ratified the employment of the plaintiff after being informed that he had procured two recruits and secured their enlistment upon the quota of Hawley, and agreed to pay him $1,100 therefor. There was conflicting evidence in respect to these matters, and the defendants also introduced evidence tending to show that, if the defendants made a formal ratification of the act of Dunton in employing the plaintiff, it was done under a misapprehension and mistake as to material facts, referred to in the prayers for instructions.

The defendants requested the following instructions, amongst others:

1. Services rendered for hire, as a broker or agent, in procuring recruits and enlisting them in the military service by one who had no

[1] *Accord:* Hammond v. Hannin, 21 Mich. 374.

Under a statute providing "that no person shall be bound as the surety of another by the act of an agent, unless the authority of the agent is in writing, signed by the principal," it was held that an unauthorized contract of suretyship may be orally ratified. Ragan v. Chanault, 78 Ky. 545.

other interest in filling the quota of the town toward which they were credited, do not furnish a legal cause of action to recover the price.

2. Ratification is not effectual unless made with full knowledge of all material facts. In this case, it would be a material misapprehension if the defendants supposed Dunton waived any claim in his own behalf, in favor of the plaintiff, or if the plaintiff's agent misrepresented the day of putting in the men, and there was meanwhile a change of price.

3. If there was such a material mistake, it makes no difference how it arose, or whether the defendants might have ascertained the contrary to be true.

The judge declined to give the first of the above instructions; he gave the second, adding, after the words: "in favor of the plaintiff," the following words: "when, in fact he had not done it;" and he gave the third, adding at the end, "unless it arose from the negligence of the defendants."

The jury returned a verdict for the plaintiff, with $1,201.75 damages; and the defendants alleged exceptions.

Bigelow, C. J.— * * * The general rule is perfectly well settled, that a ratification of the unauthorized acts of an agent, in order to be effectual and binding on the principal, must have been made with a full knowledge of all material facts, and that ignorance, mistake or misapprehension of any of the essential circumstances relating to the particular transaction alleged to have been ratified will absolve the principal from all liability by reason of any supposed adoption of or assent to the previously unauthorized acts of an agent. We know of no qualification of this rule such as was engrafted upon it in the instructions given to the jury in the present case. Nor, after considerable research, have we been able to find that such qualification has ever been recognized in any approved text writer or adjudicated case. And, upon consideration, it seems to us to be inconsistent with sound principle.

Ratification of a past and completed transaction, into which an agent has entered without authority, is a purely voluntary act on the part of the principal. No legal obligation rests upon him to sanction or adopt it. No duty requires him to make inquiries concerning it. Where there is no legal obligation or duty to do an act, there can be no negligence in an omission to perform it. The true doctrine is well stated by a learned text writer: "If I make a contract in the name of a person who has not given me an authority, he will be under no obligation to ratify it, nor will he be bound to the performance of it." 1 Livermore on Agency 44. See also Paley on Agency 171, note o. Whoever, therefore, seeks to procure and rely on a ratification is bound to show that it was made under such circumstances as in law to be binding on the principal, especially to see to it that all material facts were made known to him. The burden of making inquiries and of ascertaining the truth is not cast on him who is under no legal

obligation to assume a responsibility, but rests on the party who is endeavoring to obtain a benefit or advantage for himself. This is not only just, but it is practicable. The needful information or knowledge is always within the reach of him who is either party or privy to a transaction which he seeks to have ratified, rather than of him who did not authorize it, and to the details of which he may be a stranger.

We do not mean to say that a person can be wilfully ignorant or purposely shut his eyes to means of information within his own possession and control, and thereby escape the consequences of a ratification of unauthorized acts into which he has deliberately entered; but our opinion is that ratification of an antecedent act of an agent which was unauthorized cannot be held valid and binding, where the person sought to be charged has misapprehended or mistaken material facts, although he may have wholly omitted to make inquiries of other persons concerning them, and his ignorance and misapprehension might have been enlightened and corrected by the use of diligence on his part to ascertain them. The mistake at the trial consisted in the assumption that any such diligence was required of the defendants. On this point, the instructions were stated in a manner which may have led the jury to misunderstand the rights and obligations of the parties.

Exceptions sustained.[1]

ELLIOTT, C. J., IN CROWDER ET AL. v. REED.

1881. SUPREME COURT OF INDIANA. 80 Ind. 1.

THE third instruction given by the court at the request of the appellee is as follows: "If a man transacts business for another, or for other persons for his or their benefit, and the principal accepts the benefit and the fruits of his agency he thereby ratifies and adopts the agency of him who transacts the business and is bound by his acts and the legal consequences thereof in the transaction of such business. Therefore, if James B. Patton, acting without authority from any one, but as the friend of both parties, or of either party, procured for

[1] *Accord:* Trustees of Easthampton v. Bowman, 136 N. Y. 521; Daley v. Iselin, 218 Pa. St. 515; Woods v. Palmer, 151 Mich. 30.

"The second request sought to incorporate into the doctrine of ratification a new element, namely, that, in order to make a valid ratification, the principal must have known, not only all the facts, but also the legal effect of the facts, and then, with a knowledge both of the law and facts, have ratified the contracts by some independent and substantive act. This request also was properly refused. It is sufficient if a ratification is made with a full knowledge of all the material facts." Allen, J., in Kelley v. Newburyport, etc., R. R. Co., 141 Mass. 496, 498. To same effect see Ingraham, J., in Hanks v. Drake, 49 Barb. (N. Y.) 186, 202.

the plaintiffs the notes and mortgages sued on, and they accepted the same, they thereby ratified all of Patton's acts in and about the procuring of said notes and mortgage, and if said notes and mortgage were given by the defendant upon the agreement or understanding that her son, William Reed, was not to be prosecuted, then the notes and mortgage are void."

This instruction is subject to serious objection. If Patton was the agent of the appellee and not of appellants, the doctrine of ratification does not apply. If he was not avowedly acting as their agent, they cannot be said to have ratified his act. The law upon this subject is thus laid down by a text-writer: "One other consideration is important to be borne in mind. It is that a ratification can only be effectual between the parties, when the act is done by the agent avowedly for or on account of the principal, and not when it is done for or on account of the agent himself, or of some third person." Story Agency, § 251a. In Meiners v. Munson, 53 Ind. 138, this doctrine is approved and the following statement of the rule is quoted from 1 Chitty Cont. 293: "But where the party making the contract had no authority to contract for the third person, and did not profess, at the time, to act for him, it seems that the subsequent assent of such third party, to be bound as principal, has no operation." Under the evidence in this case the instruction was, upon this point, entirely too broad. If Patton was the appellee's agent and the instruction extends to both parties, for the language is "either party," the appellants, whose interests were hostile, could not be justly said to have ratified his acts by receiving and retaining what was tendered them.

The instruction leaves out of consideration the element of knowledge. If, as appellants claimed, the notes and mortgage were delivered to them in consideration that they would pay William Reed's debt to the express company and release him, they would not be bound by an act of Patton, of which they had no knowledge. This would certainly be so if he was the appellee's agent and not theirs. The instruction declares that they would be bound by a subsequent ratification whether Patton was their agent, or was the agent of the appellee, and is, therefore, plainly erroneous.

It is in general true, that a principal is not bound where the ratification is made in ignorance of material facts. Manning v. Gasharie, 27 Ind. 399. If the appellants acted in ignorance of what Patton had said to the appellee, and in good faith believed that the notes and mortgage were executed to them in consideration of their payment of the debt of William Reed to the express company, and his release from liability to them to the extent of the sum evidenced by the notes and mortgage, they cannot be justly said to have ratified an illegal agreement of which they were entirely ignorant.[1]

[1] *Accord:* Commercial Bank v. Jones, 18 Tex. 811; Wycoff v. Davis, 127 Ia. 399.

SECOMBER AND ANOTHER v. DAY.

1884. Superior Court at Litchfield County.
37 Conn. 340

Action to recover for a piano sold, brought to the District Court of Waterbury, and tried to the court before Bradstreet, J. Facts found and judgment rendered for the plaintiffs, and appeal by the defendant. The case is fully stated in the opinion.

Loomis, J.—The plaintiffs have been for many years dealers in musical instruments at New Haven, with a branch store at Waterbury, which from 1880 to October, 1882, was under the sole charge and management of one Henry R. Day, the general agent of the plaintiffs. Day was paid a regular salary and received in addition a commission on all sales made by him for the plaintiffs. While acting as such agent, he sold from the store in Waterbury one of the plaintiffs' pianos to the defendant for the agreed price of three hundred dollars, which was agreed to be paid for wholly by certain commissions that might become due from Day to the defendant on future stock transactions between the defendant and Day on his private account. The defendant had been for a considerable time engaged in the business of a stock broker and as such had had previous dealings with Day. The plaintiffs had no actual knowledge of the sale of the piano until after Day had left their employment. He had reported to them that the piano was rented to the defendant. But the finding is explicit that the plaintiffs were ignorant of the terms of the sale after Day left their employ, and before the bringing of this suit. The defendant earned commissions in his stock transactions on Day's account to the amount of one hundred and eighty-five dollars, which were credited by Day to the piano account, but not paid over to the plaintiffs. In the mean time the defendant paid the plaintiffs several sums, aggregating one hundred dollars, which is all the plaintiffs ever received towards the price of the piano. Day was a defaulter to his dealings with the plaintiffs to an amount exceeding five thousand dollars.

The manifest wrong and injustice perpetrated upon the plaintiffs by the defendant and Day, make as regards him the principles of law applicable to the remedy chosen by the plaintiffs very easy of decision enough to afford relief. But the greatest good to the greatest number requires adherence to sound general principles even though in a given case a party may fail in obtaining redress. The whole trouble in this case arises from a mistake as to the plaintiffs' remedy.

When the plaintiffs were informed of the terms of the contract made by their agent for the sale of the piano to the defendant they had an election to repudiate the arrangement, and on tendering back what they had received as payment on the piano, the sale and

SHONINGER AND ANOTHER v. PEABODY.

1889. SUPREME COURT OF ERRORS OF CONNECTICUT.
57 Conn. 42.

ACTION to recover for a piano sold; brought to the district court of Waterbury, and tried to the court before Bradstreet, J. Facts found and judgment rendered for the plaintiffs, and appeal by the defendant. The case is fully stated in the opinion.

LOOMIS, J.—The plaintiffs have been for many years dealers in musical instruments at New Haven, with a branch store at Waterbury, which from 1880 to October, 1886, was under the sole charge and management of one Henry R. Day, the general agent of the plaintiff. Day was paid a regular salary and received in addition a commission on all sales made by him for the plaintiffs. While acting as such agent he sold from the store in Waterbury one of the plaintiff's pianos to the defendant for the agreed price of three hundred dollars, which was agreed to be paid for wholly by certain commissions that might become due from Day to the defendant on future stock transactions between the defendant and Day on his private account. The defendant had been for a considerable time engaged in the business of a stock broker, and as such, had had previous dealings with Day. The plaintiffs had no actual knowledge of the sale of the piano until after Day had left their employment. He had reported to them that the piano was rented to the defendant. But the finding is explicit that the plaintiffs were informed of the terms of the sale after Day left their employ, and before the bringing of this suit. The defendant earned commissions in his stock transactions on Day's account to the amount of one hundred and eighty-five dollars, which were credited by Day on the piano account, but not paid over to the plaintiffs. In the year 1886 the defendant paid the plaintiffs several sums, aggregating seventy-five dollars, which is all the plaintiffs ever received towards the price of the piano. Day was a defaulter in his dealings with the plaintiffs to an amount exceeding five thousand dollars.

The manifest wrong and injustice perpetrated upon the plaintiffs by the defendant and Day, make us regret that the principles of law applicable to the remedy chosen by the plaintiffs are not flexible enough to afford relief. But the greatest good to the greatest number requires adherence to sound general principles, even though in a given case a party may fail in obtaining redress. The whole trouble in this case arises from a mistake as to the plaintiff's remedy.

When the plaintiffs were informed of the terms of the contract made by their agent for the sale of the piano to the defendant, they had an election to repudiate the arrangement, and by tendering back what they had received in ignorance of the terms of the sale, and

demanding the piano, they could have recovered it by an action of replevin, or obtained its value in trover. But, knowing the terms of the sale, they elected to sue in assumpsit on the contract for the agreed price, and thereby they affirmed the contract and ratified the act of the agent, precisely as if it had been expressly approved upon being reported to them by the agent or the defendant; and in contemplation of law a subsequent ratification and adoption of an act has relation back to the time of the act and is tantamount to a prior command. 1 American Leading Cases, 4th ed., 592.

The argument for the plaintiffs (though it is not so stated) seems really to involve the fallacious assumption that the plaintiffs could affirm the contract in part and repudiate it in part, that is, that the contract is to be treated as good for the agreed price, but bad as to the agreed mode of payment. But the law requires a contract to be affirmed or repudiated in its entirety. Shepard v. Palmer, 6 Conn. 100; Newell v. Hurlburt, 2 Vermont 351. See also the cases hereinafter cited.

There was no contract at all relative to the piano except the one made by Day as their agent, and when the plaintiffs, knowing the facts, sued on that contract, they affirmed it in every essential particular both as to price and as to the terms of paying the price.

The leading case on this subject is Smith v. Hodson, 4 T. R. 211, where it was held that if a bankrupt, on the eve of his bankruptcy, fraudulently delivered goods to one of his creditors, the assignees may disaffirm the contract and recover the value of the goods in trover; but if they bring assumpsit, they affirm the contract with all its incidents, so that a creditor may even set off his debt; and the principle established in that case has ever since been considered to rest upon an impregnable foundation, that the existence of the contract could not be affirmed to promote the purpose of a recovery, and at the same time be treated as a nullity in order to shut out the opposite party from a defense otherwise open to him.

In Butler v. Gable, 1 Watts & Serg. 108, the trustees in a domestic attachment, which is a proceeding in the nature of a commission of bankruptcy, sued the defendant in assumpsit for the amount of a check, which had been transferred to him by the party against whom the attachment issued, subsequently to its date, and relied on the invalidity of the transfer as ground of recovery. But it was held by the court that, whatever the result might have been had the action been laid in tort, the necessary result of laying it in contract was to affirm the transaction on which it was founded, and entitle the defendant to show that he had received the check in payment of a debt.

For the same reason it has long been held that a principal who seeks to enforce a sale made by his agent, cannot ordinarily allege that the agent exceeded his instructions in warranting the goods,

because he must accept the contract as a whole in order to rely on any portion.

The general [illegible] of judicial opinion in the United States is in perfect accord with authorities cited from the English courts. We will select a few only of the numerous cases in the latter courts upon which we have to [illegible].

One of the most recent cases is that of Hillman, Carpenter & Co. v. Mayor, decided in August, 1883, in the supreme court of [illegible], reported in Vol. 6 of New England Reporter, 801. The case is stated by Harmon, J., in giving the opinion of the court, as follows: "The action is to compel action on a contract entered [illegible] alleges that he received from the plaintiff the goods named and makes no question as to the price. This makes a prima facie case against him, and though technically it does not change the burden of proof it devolves upon him if he would avoid the responsibility, to give some reason why. The explanation offered by the defendant is, that though he received the goods from the plaintiff, he received them by virtue of an express agreement with an agent or traveling salesman of the plaintiff, one element in which was that certain goods of a like kind, which the defendant then had, should be taken in payment. That agreement was the agent's act and not the principal's, but the principal is not bound (1) that the agent had no authority to make such a contract, and (2) that the contract under which the action is sought to be maintained was made directly with the plaintiff, though to some degree through the instrumentality of the agent. Assuming, under the first, that the agent had no authority to make the contract he did—and the evidence is quite sufficient upon that point—still it does not follow that the principal [illegible] has only assumed the authority to do so, but the principal has been a contractor. By [illegible] the contract the agent [illegible] this was the only contract having the assent of the [illegible] the contract under which he acted and by virtue of which he claims the goods. It is quite clear that the plaintiff could not [illegible] upon a contract he did not make, or repudiate the contract in part and hold the remainder valid. [illegible] v. Jones, 3 Allen 369. 'You can not be holden upon an implied contract, for that is excluded by the express.'"

In Smith v. Plummer, 3 Watson Ky. [illegible] upon the weight of the authorities, was held to have been [illegible] that [illegible] in evidence as a defense to a suit brought against to recover.

In Goldman v. Goodell et al. 40 Iowa 324, an action on the notice of a note and mortgage and note notes for the same, and to the execution of which before named by the [illegible] of the latter, who was not a party to the former note agreed [illegible] the authority of the principal, to accept the mortgage. The general [illegible] brought a suit [illegible] against the [illegible] of the note

because he must accept the contract as a whole if he means to rely on any portion.

The general consensus of judicial opinion in the United States is in perfect accord with authorities cited from the English courts. We will select a few only of the numerous cases affirming the principles upon which we base our opinion.

One of the most recent cases is that of Billings, Taylor & Co. v. Mason, decided in August, 1888, by the supreme court of Maine, reported in Vol. 6 of New England Reporter, 791. The case is stated by Danforth, J., in giving the opinion of the court, as follows: "The action is assumpsit upon an account annexed. The defendant admits that he received from the plaintiff the goods charged and makes no question as to the price. This makes a *prima facie* case against him; and though technically it does not change the burden of proof, it devolves upon him, if he would avoid the responsibility, to give some reason why. The explanation offered by the defendant is, that though he received the goods from the plaintiff, he received them by virtue of an express agreement with an agent or traveling salesman of the plaintiff, one element of which was that certain goods of a like kind, which the defendant then had, should be taken in payment. This agreement with the agent is not questioned, but the answer to it is two-fold: (1) that the agent had no authority to make such a contract; and (2) that the contract under which the action is sought to be maintained was made directly with the plaintiff, though in some degree through the instrumentality of the agent. Assuming, under the first, that the agent had no authority to make the contract he did—and the evidence is quite conclusive upon that point—still it does not change the conceded fact that he not only assumed the authority to do so, but did actually make such a contract. Waiving for the moment the second point raised, this was the only contract having the assent of the defendant—the contract under which he acted and by virtue of which he obtained the goods. It is quite clear that the plaintiff cannot hold him upon a contract he did not make, or repudiate the contract in part and hold the remainder valid. Brigham v. Palmer, 3 Allen 450. Nor can he be holden upon an implied contract, for that is excluded by the express."

In Smith v. Plummer, 5 Wharton 89, a contract made for the benefit of the defendants was held to have been ratified by their giving it in evidence as a defense in a suit brought contrary to its terms.

In Beidman v. Goodell *et al.*, 56 Iowa 592, an agent for the owner of a note and mortgage took new notes for the debt, and in consideration of their being signed by the wife of the maker, who was not a party to the former note, agreed (without the authority of his principal) to cancel the mortgage. His principal having brought a suit and taken judgment against the maker of the new

notes, was held to have ratified the agreement, so that he could not enforce the mortgage which at the time was improperly canceled.

In Peninsular Bank v. Hanmer, 14 Mich. 208, a contract was entered into by the cashier in behalf of the bank, by which security was given by a debtor on long time to a creditor, in the interest and on motion and arrangement of the cashier, who, in order to procure the asset of the creditor, without authority from the bank made and delivered a bond of indemnity against a prior mortgage on the property covered by the collateral security. The bank received the benefit of the transaction and defended the creditor against a suit to foreclose the prior mortgage. It was held that, having appropriated the benefits, the bank must affirm or rescind *in toto;* that it could not disaffirm as to those parts which impose an obligation and affirm it so far as it operated to its advantage, and that the entire arrangement was ratified.

In Whitlock v. Heard, 3 Rich. 88, the plaintiff was a carriage maker and his shop was under the management of W. as his foreman. W. owed the defendant by note and made and delivered to her a buggy belonging to the plaintiff in exchange for the note. The plaintiff on hearing of this, disapproved of the arrangement and brought his action for the price, alleging it to have been sold. It was held that he could not recover; that, regarding him as having adopted the contract, he would then be only entitled to the note; regarding him as having repudiated the contract, there would then be no sale of the buggy, and that his remedy was, after demand, to bring trover.

In Berkshire Glass Co. v. Wolcott, 2 Allen 227, an agent was intrusted with chattels for a certain specified purpose; he wrongfully sold the goods and received payment in money. The principal brought an action of assumpsit against the purchaser for the price. It was held that he could not recover in assumpsit, the purchaser not having sold the property and received the money for it, but that the plaintiff might have recovered in action of tort. The same principle is recognized in Jones v. Hoar, 5 Pick. 285. In the case at bar there is no claim that the defendant had sold the piano.

In Butler v. Hildreth, 5 Met. 49, an insolvent conveyed away his property in fraud of his creditors. The trustee brought a suit against the purchaser to recover the value of the property; then he discontinued that suit and brought an action to set aside the sale on the ground of fraud. It was held that, having brought an action *ex contractu,* the sale was affirmed and the latter action could not be maintained.

In Marsh v. Pier, 4 Rawle 273, the defendant purchased goods from A as agent of the plaintiff, who brought an action and recovered judgment for the price. Afterwards the plaintiff disavowed the agency and brought replevin for the goods. It was held that

the record of the former judgment was conclusive as an affirmance of the sale.

A vast number of other cases establishing the same principles might be cited, but the above will suffice. No conflicting cases were cited by the plaintiffs, unless Steward *et al.* v. Woodward, 50 Vermont 78, and Squires v. Barber, 37 Vermont 558, are to be so regarded.

In the first of these cases an agent of the plaintiffs, who were merchant tailors, owed the defendant, who was a physician, a private debt for medical services for himself and family, and being unable to pay money, persuaded the defendant to take a suit of clothes out of the plaintiff's shop in part payment, which was done. The court allowed the plaintiff to recover of the defendant the price of the suit in an action of book debt, on the ground that the act of the defendant in receiving and converting the goods to his own use raised an implied promise to pay for them. The opinion of the court is very brief and contains no discussion as to the form of remedy and no reference to the authorities generally. As to the form of remedy, it is manifestly difficult to reconcile the case with some others we have cited. In regard, however, to the question whether the suit would be effectual as a ratification of their agent's act, we suggest this distinction: that the act of the agent in paying his private debt with the plaintiffs' goods could not, perhaps, be regarded as an act done for or in behalf of the principals at all nor even in the principals' name, and was not properly a contract of sale at all, so that there was no express contract to be affirmed by the bringing of the suit, and nothing to prevent the raising of the implied promise except the fact that the defendant had not sold the goods and received money thereon. It is undoubtedly a sound doctrine, established by numerous authorities, that to make a ratification effectual it must be of some act done or engagement made as agent for or on behalf of the person whom it is alleged to bind.

The other case cited, from 37 Vermont, 558, was very similar in the principles that apply. An agent of the plaintiffs, who had authority to sell their goods, became insolvent, and owing the defendant a private debt, undertook to pay it out of the plaintiffs' goods, the defendant being charged with knowledge of all the circumstances at the time. The plaintiffs sued in assumpsit and the defendant, instead of denying the plaintiffs claim, undertook merely to set off the debt against their claim, which of course could not be done.

There is error in the judgment complained of and it is reversed. In this opinion the other judges concurred.[1]

[1] *Accord:* Bailey v. Pardridge, 134 Ill. 188.

HYATT v. CLARK.

1890. Court of Appeals of New York. 118 N. Y. 563.

Appeals by Elizabeth A. L. Hyatt from two several orders of the general term of the superior court in the city of New York made June 23, 1887, which respectively reversed separate judgments in her favor entered upon the decision of the court on trial at special term.

These are cross-actions between the same parties, tried together and submitted upon the same evidence. The findings are the same in each, except as to matters purely formal. The action brought by Mr. Clark was for the specific performance of a clause in a lease between the parties, which provided for the renewal thereof upon the expiration of the first term of five years. The action brought by Mrs. Hyatt was to annul and cancel said lease upon the ground that her agent had exceeded his authority in executing and delivering it.

On the 2d of January, 1880, Mrs. Hyatt, who was then in England, appointed her brother, Arthur Lake, her agent to manage and conduct her property and affairs in the United States; to sell and dispose of all or any part of her real or personal estate; to convey and assign the same to the purchaser or purchasers thereof; to receive and recover all sums of money due or to become due to her, and to sign, seal and execute all such agreements, conveyances, assurances, acts, deeds, matters and things as should be required. The appointment was by written instrument, duly signed, sealed and acknowledged.

About January 15, 1880, negotiations were begun between Mr. Clark and Mr. Lake in relation to a lease of certain premises belonging to Mrs. Hyatt, known as No. 25 Waverly Place, in the city of New York. Clark raised the question whether Lake was authorized by said power of attorney to give a lease, and wished him to cable for additional authority, but he did not do so, as he had written to Mrs. Hyatt about the offer made and his letter was about due. Pending an answer to his letter, and about January 29th, the lease in question was signed by Lake as attorney for Mrs. Hyatt, the lessor, and by Clark and one Gardner, as lessee. Lake then handed the lease to Clark, for himself and Gardner, but, as the court found, "Clark did not accept the delivery of the lease, but postponed his decision as to accepting or not accepting until he should hear further from Mrs. Hyatt." On the seventh of February, Mrs. Hyatt sent a cable message to Lake, in these words: "Your powers attorney canceled. Sign no lease." In a day or two Lake showed this message to Clark and requested him to cancel "the matter of the lease and letting so far as the same had proceeded," but he refused, saying that he would take any risk there might be. He thereupon filed

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(See Connor v. Hyatt, 118 N. Y. 562.)

his lease for record and took possession of the premises. Lake did not report to his sister that the lease had been "executed in any sense conditionally, or that Clark had not accepted delivery before the receipt of the message," but he informed her that it was signed January 29th, that it was valid and that it could not be canceled or avoided. Mrs. Hyatt did not know that there had been any condition connected with the delivery of the lease until November 10, 1884, when she heard of it through Lake. In the meantime she had accepted the rent reserved by the lease as it became due in quarterly payments, the first payment having been made May 1, 1880. The lease provided for an annual rental of $2,000 for five years, with the right of renewal for a second and third term of five years each, at $2,500 per year during the former, and $3,500 per year during the latter. The lessees were to expend not less than $2,000 during the first six months in improving the premises, and they, in fact, expended more than $4,000 for that purpose.

Before the commencement of this litigation Clark, having first acquired all of Gardner's interest in the lease, gave due notice of his election to continue as tenant for another term of five years.

Further facts appear in the opinion.

VANN, J.—We do not deem it important to decide whether the power of attorney authorized Mr. Lake to execute the lease in question or not, because, in either event, the same result must follow, under the circumstances of this case.

If, on the one hand, he acted without adequate authority in giving the lease, both the lessor and lessee knew it, for both knew the facts and both are presumed to have known the law, and the former, at least, had an absolute right to disaffirm the contract. As she knew the contents of the power of attorney and the lease, and that the latter was executed by her agent in her name, it was not necessary that she should be informed of the legal effect of those facts. (Kelly v. Newburyport & Amesbury Horse R. R. Co., 141 Mass. 496; Phosphate Lime Co. v. Green, L. R. (7 C. P.) 43; Mechem on Agency, § 129.)

Whether influenced by caprice or reason, if she had promptly notified the lessee that she repudiated the lease because her agent had no power to execute it, their rights would have been forthwith terminated and they would have had no lease. The right to disaffirm on one tenable grounds would if acted upon, have been as effective as the right to disaffirm upon all possible grounds. Under the condition supposed, the law gave her the same right to disaffirm without any agreement to that effect, that she would have had if her agent, being duly authorized to lease, had expressly provided, in the written instrument, that she could disaffirm if she chose to do so. Therefore, by accepting the rent of the demised premises for more than four years without protest or objection, she ratified the lease as completely as she could have if she had known of two

grounds upon which to disaffirm, instead of only one. Two grounds could not make the right any more effectual than one. If she had the right at all, the number of grounds upon which she could justify its exercise is unimportant. Her ratification was none the less complete, because, being unwilling to run the risk of a doubtful question of law, she did not at once act as she would have acted if she had known all of the facts. As said by the court in Adams v. Mills, (60 N. Y. 539), "the law holds that she was bound to know what authority her agent actually had." Having executed the power of attorney, she is conclusively presumed to have known what it meant and the extent of the authority that it conferred. (Best on Ev., 123; Whart on Ev., § 1241.)

If the lease was *ultra vires,* therefore, by ratifying it, she in legal effect executed and delivered it herself, and whatever was said between Lake and Clark, became immaterial. Even if they agreed that she should have the right to disapprove, it is of no importance, because she had that right without any such agreement. If her agent had no power to execute the lease, the delivery thereof, whether absolute or conditional, could not affect her rights. If she was dissatisfied with it, she could have been relieved of all responsibility thereunder by promptly saying to the lessees: "This contract was not authorized by the agency I created, and I refuse to be bound by it." After that there would have been no lease. If the action of her agent was unauthorized, it did not bind her, until by some act of ratification she bound herself. By ratifying, she waived any right to disaffirm upon any ground, known or unknown, because the lease did not exist, as a lease, by the act of her agent, but by her own act of confirmation.

If, on the other hand, Mr. Lake was duly authorized to give the lease, certain presumptions of controlling importance spring from that fact. He is presumed to have disclosed to his principal, within a reasonable time, all of the material facts that came to his knowledge while acting within the scope of his authority.

It is laid down in Story on Agency (§ 140), that "notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from or is at the time connected with the subject-matter of his agency, for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal, and if he has not, still the principal having intrusted the agent with the particular business, the other party has a right to deem his acts and knowledge obligatory upon the principal."

In other words, she was chargeable with all the knowledge that her agent had in the transaction of the business he had in charge. (Ingalls v. Morgan, 10 N. Y. 178; Adams v. Mills, *supra;* Myers v. Mutual Life Ins. Co., 99 N. Y. 1, 11; Bank of U. S. v. Davis, 2 Hill 451; Higgins v. Armstrong, 9 Col. 38.)

It was his duty to keep her informed of his acts and to give her timely notice of all facts and circumstances which would have enabled her to take any step that she deemed essential to her interests.

She does not question the good faith of Mr. Lake, and there is no proof of fraudulent collusion between him and Mr. Clark, who, while under no obligation to inform Mrs. Hyatt of the facts, had the right to assume that her agent had done so. (Ingalls v. Morgan, *supra;* Meehan v. Forrester, 52 N. Y. 277; Scott v. Middletown U. & W. G. R. R. Co., 86 *id.* 200.)

It was her duty to protect her interests by selecting an agent of adequate judgment, experience and integrity, and if she failed to do so, she must bear the loss resulting from his inexperience, negligence or mistaken zeal. After the lapse of sufficient time, therefore, she is presumed to have acted, with knowledge of all the acts of her agent, in the line of his agency.

By accepting and retaining the rent, which was the fruit of her agent's act, for nearly five years without objection, she is presumed to have ratified that act. (Hoyt v. Thompson, 19 N. Y. 207; Alexander v. Jones, 64 Iowa 207; Heyn v. O'Hagen, 60 Mich. 160, post p.; 2 Greenl. on Ev. §§ 66, 67.) Without expressing any dissatisfaction to the lessees, she received eighteen quarterly payments of rent before electing to avoid the lease. She made no offer to return any part of the rent so paid, although she tendered back the amount deposited to her credit for the nineteenth quarter at the time that she demanded possession of the premises.

Independent of what she is presumed to have known through the information of her agent, she in fact knew the terms of the lease and that it was executed by Mr. Lake in her name.

Upon her arrival in this country in September, 1880, she visited the premises and saw the additions and improvements that the tenants were making thereto, and at the time as well as subsequently, rent was paid to her in person. Apparently she had all the knowledge that she cared to have, for she made no inquiry of her agent until about six months previous to the expiration of the first term of five years, and not until after the lessees had given notice of their election to continue the lease for a second term. Thinking that the rent was low, she then tried to finding out something from her agent that would enable her to avoid the lease and as a result of her efforts in this direction, ascertained the fact upon which she based her right to succeed in this litigation. But it was then too late for her to disaffirm, because her long silence and many acts of ratification had been relied upon by the tenants, who had expended a large sum of money in making permanent improvements on the property. Having received the benefit of the contract, she could not, after years of acquiescence, suddenly invoke the aid of the courts to relieve her of any further obligation, because she had

but recently discovered a fact that she should have ascertained, and which the law presumed that she did ascertain, long before. (1 Am. & Eng. Ency. of Law 429.)

We think that after ample opportunity for election and action she ratified the lease and that her ratification was irrevocable.

In each action the order appealed from should be affirmed and judgment directed upon the stipulation in favor of the respondent, with costs of appeal to this court in one action only.

All concur except Haight, J., not sitting.

Order affirmed and judgment accordingly.[1]

WALLACE et al. v. LAWYER et al.

1883. Supreme Court of Indiana. 90 Ind. 499.

Woods, C. J.—Action by the appellees to enjoin the collection by the appellants of a certain judgment of the Marion superior court, rendered in favor of Andrew Wallace against the appellees, and afterwards assigned by the said Andrew to his wife and co-appellant.

It was admitted on the trial "that on the 31st day of August, 1878, Joseph M. Wallace executed an assignment of said judgment in proper form, on the proper record, in the name of said Andrew Wallace to Asher G. Walton," but it is claimed that Joseph M. Wallace had no authority to make the assignment, and that, for the want of evidence to show such authority, the motion of the appellants for a new trial should have been sustained.

The evidence shows, or tends strongly to show, that before the execution of the assignment in question Andrew Wallace, in consideration or payment of moneys which he had received of his wife, had sold and transferred to her a stock of groceries and had executed to her a written assignment of accounts, demands and judgments, including the one in question, and, having thus disposed of his business and property, had gone to a western territory to look after mining interests. Of the goods and business thus transferred to her, Mrs. Wallace put her son Joseph M. Wallace in charge, and while so employed he sold and assigned the judgment in question to Walton for the sum of $100, which he mingled with other moneys received for and applied to the uses of his mother who, after full knowledge of the facts, made no offer to return the money to

[1] *Accord:* Kirkpatrick v. Pease, 202 Mo. 471.

The receipt of money arising from an unauthorized act, to which money the principal is entitled notwithstanding that act, does not amount to a ratification. White v. Sanders, 32 Me. 188.

Watson, but retains the same [illegible] Watson, but
Chapel only to agree on the [illegible] and that he is
willing to allow the account [illegible] Watson.
a sale or any short dates [illegible] Watson
agency on the part of Watson [illegible] Watson
tiary is evident and positive. [illegible] Watson
Wallace was not made upon [illegible] Watson
Watson.

It is clear that the [illegible] Watson
for the settlement of the [illegible] Watson
subsidies a waiver of all right [illegible] Watson
sent on account of lack of authority of the agent [illegible]

Judgment affirmed.

HALL v. HARPER.

Supreme Court of Illinois. 17 Ill. 82.

Caton, J.—This was an action of replevin for a horse. The bill of exceptions shows that in the spring of 1852, [illegible] plaintiff, about eighteen years of age, and who resided with him, exchanged the horse in question, which belonged to the plaintiff, with the defendant for another horse. A few days after the exchange the plaintiff [illegible] to exchange the horses. After some [illegible] the boy took the horse home to the plaintiff. The [illegible] exchange was made on Saturday, and the exchange was [illegible] next day after. The boy told his father, on the [illegible] agreement which he had made to exchange, and it [illegible] that the plaintiff expressly assented to the [illegible] The witness does not seem to remember what [illegible] it may be safe to say he knew his father did not [illegible] exchange. It does not appear from the [illegible] was his father made any objection when he brought [illegible] he got of the defendant. The plaintiff was [illegible] using the horse a few days after the exchange. He [illegible] without [illegible] that of the horse which he had [illegible] with

[illegible] discovered a flaw that she should have ascertained, and avoid the law proceedings that [illegible] long before. Ca[illegible] & Trust Co. [illegible]

We think [illegible] opportunity to [illegible] and [illegible] the [illegible] was irrevocable.

In such a case [illegible] should be affirmed and judgment directed [illegible] in favor of the respondent, with costs of appeal [illegible] in one action only.

All concur, except [illegible], not sitting.

Order affirmed [illegible].

[illegible] v. LAWYER et al.

[illegible] Court of Indiana. [illegible] 499.

[illegible] the appellees to enjoin the collection of [illegible] judgment of the Marion superior court, [illegible] Wallace against the appellees, and [illegible] the said Andrew to his wife and co-appellee.

[illegible] on the trial "that on the 31st day of August, [illegible] caused an assignment of said judgment [illegible] record, in the name of said Andrew [illegible] but it is admitted that Joseph M. Wallace had [illegible] to make the assignment, and that, for the want of [illegible] authority, the motion of the appellants for a new trial should have been sustained.

The evidence [illegible] tends strongly to show, that before the execution of the assignment [illegible] Andrew Wallace, in consideration of payment of [illegible] which he had received of his wife, had sold and transferred a [illegible] stock of groceries and had executed to her a [illegible] assigning accounts, demands and judgments, including the one in question, and, leaving this disposed of his [illegible] property [illegible] a western territory to look after mining interests. [illegible] of business [illegible] transferred to her. Mrs. Wallace put [illegible] charge of Mr. Wallace in charge and [illegible] employed her [illegible] assigned the judgment in question to Wallace for the sum of [illegible] which he mingled with other money received for and [illegible] the case of the debtor who, after full knowledge of the [illegible] refused to return the money to

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[illegible] v. [illegible], [illegible] 58.

The record of [illegible] shows that [illegible] which orders [illegible] proceed is entitled [illegible] that [illegible] does not appear to be a transcript. [illegible] v. Sanford, 24 Wis. 579.

Walton, but retains the same, upon the pretense that Walton purchased only as agent for the judgment defendant, and that she is willing to allow the amount as a credit upon the judgment. If it can be said that there is any evidence tending to show such agency on the part of Walton it is slight, and the proof to the contrary is explicit and positive. The assignment of record to Mrs. Wallace was not made until after the entry of the assignment to Walton.

It is clear that the retention of the money received of Walton for the assignment of the judgment, after notice of the facts, constituted a waiver of all right to dispute the validity of the assignment on account of lack of authority of the agent to make it.

Judgment affirmed.[1]

HALL v. HARPER.

1855. Supreme Court of Illinois. 17 Ill. 82.

Caton, J.—This was an action of replevin for a horse. The bill of exception shows that in the spring of 1852, a son of the plaintiff, about eighteen years of age, and who resided with him, exchanged the horse in question, which belonged to the plaintiff, with the defendant for another horse. A few days before the exchange the plaintiff forbid his son to exchange the horse. After the exchange the son took the horse home to the plaintiff. The agreement to exchange was made on Saturday, and the exchange was made several days after. The son told his father, on the Saturday, the agreement which he had made to exchange and it does not appear that the plaintiff expressly approved of or forbid the exchange. The witness does not seem to remember what his father said about it, only he says he knows his father did not tell him to make the exchange. Nor does it appear from the son's testimony, that his father made any objections when he brought the horse home which he got of the defendant. The plaintiff was afterwards seen riding the horse. A few days after the exchange, the plaintiff told the witness, Snyder, that if the horse which his son had swapped with

[1] The acceptance of the benefits arising from an unauthorized act without knowledge of the act does not amount to a ratification. Thacher v. Pray, 113 Mass. 291.

"Where, however, the principal receives from his agent the proceeds of the unauthorized act, with his report or account of the transaction, he cannot ignorantly or purposely shut his eyes to means of information within his possession and control, and thereby avail himself of the benefits of the transaction, and then repudiate it. If he so receives and retains the benefits of the transaction, he ratifies it." Start, C. J., in Johnson v. Ogren, 102 Minn. 8, 13.

the defendant for, "lived and lucked well, he would make a horse that would sell for more than the one his son had swapped to defendant." The parties lived about two miles apart, and met several times; and on one occasion the defendant rode the horse in controversy to the plaintiff's house, but nothing was said between them about the exchange of horses which had been made. Two or three weeks after the exchange had been made, the plaintiff was taken sick and remained ill till about the time this suit was commenced. After the exchange the son took the horse home to his father's where he remained two or three months; at the expiration of which time, the plaintiff took the horse back to the defendant and offered to return him, and demanded of the defendant the horse which his son had let him have. The defendant refused to return him, whereupon this suit was brought.

From this evidence the jury was well warranted in finding that the plaintiff had acquiesced in and approved of the exchange of horses which had been made by his son, and thus adopted that act as his own. He did not repudiate the bargain which his son had made for the exchange when he was advised of it before the exchange was actually made, but passively allowed the executory bargain to be executed; and when his son brought the horse home he made no objections to the exchange, but retained and used the horse obtained of the defendant. He still forbore to remonstrate when he met the defendant several times subsequently, and even when the defendant rode the horse, which he had obtained of his son, to his house. It is plainly inferable, from the evidence, that he retained and treated the horse as his own for about three months, without a word of dissatisfaction or disapproval. An old and just legal maxim may well be applied to the plaintiff here, which says, if he keeps silent when duty requires him to speak, he shall not be allowed to speak when duty requires him to keep silence. His continued silence and long apparent acquiescence in the act of his son, well justified the defendant in supposing that it met with his entire approval. He cannot be allowed to lay by and speculate on the chances of a good or bad bargain, or upon the chances of the horse, procured of the defendant, turning out good or bad: or, to use his own expression, "lucking well." If he intended to repudiate the action of his son, he should have done so promptly, so that the defendant might know what he had to rely upon.

We think a different verdict would not have been justified by the evidence, and the judgment must be affirmed.

Judgment affirmed.[1]

[1] See Story on Agency, 8th ed., § 258.

"If Dawley was without original authority to borrow money on behalf of his principal, but did in fact so borrow, and used it in a manner advantageous to the party to be charged, the ratification of his unauthorized act may be inferred from the silence of the principal after knowledge of the facts. It is

the defendant in, "fixed and talked well, he would make a horse that would sell for more than the one his son had swapped to defendant." The parties lived about two miles apart, and met several times; and on one occasion the defendant rode the horse in controversy to the plaintiff's house, but nothing was said between them about the exchange of horses which had been made. Two or three weeks after the exchange had been made, the plaintiff was taken sick and remained so till about the time this suit was commenced. After the exchange [illegible] came home to his father's [illegible] of three months; at the expiration of which time, the plaintiff sent the horse back to the defendant and offered to [illegible], and demanded of the defendant the horse which [illegible] had. The defendant refused to return him, whereupon this suit was brought.

From this evidence the jury was well warranted in finding that the plaintiff [illegible] assented to and approved of the exchange of horses which was made by his son, and thus adopted that act as his own. [illegible] repudiate the bargain which his son had made [illegible] when he was informed of it before the exchange [illegible] made, but passively allowed the executory [illegible] when his son brought the horse home he [illegible] the exchange, he retained and used the [illegible] the defendant. He did nothing to remonstrate [illegible] several times subsequently, and even [illegible] the horse, which he had obtained of his son [illegible] inferable from the evidence that he retained and used the horse as his own for about three months without a word of dissatisfaction or disapproval. An old and just legal maxim may well be applied to the plaintiff here, which says, if he keep silent when conscience requires him to speak, he shall not be allowed [illegible] requires him to keep silence. His continued [illegible] general acquiescence in the act of his son, well justified the defendant in supposing that it met with his entire approval. [illegible] allowed to lay by and speculate on the chances of a good or bad bargain, or upon the chances of the horse [illegible] turning out good or bad; [illegible] his own expression, "turning well." If he intended to [illegible] the action of his son, he should have done so promptly, so that the defendant [illegible].

We think a different verdict would not have been justified by the evidence, and the judgment must be affirmed.

Judgment affirmed.

[1] See Story on Agency, [illegible]

[illegible]

WEAVER v. OGLETREE.

1869. Supreme Court of Georgia. 39 Ga. 586.

Non est factum. Newton superior court.

David Ogletree and others, as executors of Philemon Ogletree, sued John S. Weaver and Isham Weaver, upon a promissory note purporting to be signed by them, dated the 9th of December, 1861, and due the 7th of December, 1862, for $814.03, payable to the executors of said Philemon Ogletree. Isham Weaver plead *non est factum.* Plaintiff's counsel introduced a witness who professed to know Isham Weaver's handwriting, and who testified that he thought Isham Weaver signed said note. The note was read in evidence and plaintiff closed.

Isham Weaver testified that he never saw said note till he was sued on it, and did not sign it nor authorize anyone else to sign his name thereto; that about the date of this note John Webb called on him and said he had a note on him and John S. Weaver for $1,200 or $1,500, and that he wished the note put into two notes, that he might turn over $500 of the amount to some religious society, and he told Webb to go and see John; the note was not shown to him and he heard no more of it till plaintiff's attorney dunned him just before this suit, and he told said attorney to go to his son, John S. Weaver; he would have told the attorney that the note was not his deed, but he was ashamed; when Webb called on him, John S. had considerable property, and when the attorney dunned him, John S. had some property; when one of the plaintiffs called on him and proposed to take a small amount for the note, he told him that the note was not his, and that he would not pay it. It was then shown by several witnesses that Isham Weaver's name was not in his handwriting.

In rebuttal it was shown that from 1844, Isham Weaver and Philemon Ogletree had had transactions, and one of the executors testified that for ten years past Philemon Ogletree held a note on

his duty, if he does not acquiesce in the unauthorized act, to repudiate it." Thatcher, C. J., in Breed v. First National Bank of Central City, 4 Col. 481, 507.

"Mere delay in repudiating will not, in our opinion, have the effect of ratifying. It would be evidence, along with other facts, from which, if it should be unreasonable, the jury might infer that there was a ratification." Collard, J., in Meyer v. Smith, 3 Tex. Civ. App. 37, 43.

"The case in which silence will amount to ratification is where the principal, having knowledge of the transactions of his agent, fails within a reasonable time to express his dissent. It is failure to express dissent to the act done by the agent, or supposed agent, within a reasonable time after knowledge of the facts, that raises the presumption of ratification; not the forbearance to sue immediately after such notice has been given." Deaderick, C. J., in McClure v. Evartson, 14 Lea (Tenn.) 495, 501.

Isham Weaver, which in January, 1861, amounted to $1,225. Another of the plaintiffs testified, that to the best of his knowledge said note was repeatedly renewed in the lifetime of Philemon Ogletree, and that after his death the note and another were turned over to Webb to be renewed and divided for the purpose aforesaid. Webb returned this note as a renewed note after said $500 was taken out by said division; and when this witness called on Isham Weaver, recently, he admitted to witness that he had known for years that his name was on said note; said that John S. had fraudulently used his name, and that he would not pay the note, adding that if this was the only one he might pay it, but as there were others he would let the court decide the matter. John Webb testified that when he called on Isham Weaver for the purpose of having the note renewed and divided into two, he said "go and see John;" he saw John, and in a day or two John brought him this note and the other for the religious society, signed as was the old note. John S. was then good, and Isham made no impression on Webb that his name was not his genuine signature. It was shown that before Isham Weaver ever denied the genuineness of the signature, John S. had left the State.

The court charged the jury that a party may bind himself to an unauthorized act of another, either by express or implied ratification. Express ratification is when a party adopts and confirms an unauthorized act of another, and assumes the liability thus created by a positive promise, and this relates back to the original transaction. Implied ratification arises when the party sought to be charged with an unauthorized act is informed of it and does not repudiate it, but acquiesces in and does not dissent from it for any length of time.

The jury found for the plaintiffs for the principal and interest on the note and costs.

A new trial was moved for, upon the grounds that the verdict was unsupported by the evidence, and because such charge was hypothetical, and therefore calculated to mislead the jury. The new trial was refused, and that is assigned as error.

Brown, C. J.—The evidence submitted to the jury in this case showed that John S. Weaver had been using the name of his father, Isham Weaver, for years, on his own notes, and that this fact was known to Isham Weaver. But he took no steps to stop this use of his name, and gave no notice to anyone interested that it was not authorized by him. When, in the language of Isham Weaver, John Webb did call on him and John S. Weaver for some twelve or fifteen hundred dollars, and wanted the note divided into two, in order that he, Webb, might turn over some five hundred dollars to some religious society, he told Webb to go to John S. Weaver. He does not pretend that he even intimated to Webb

that the note was not genuine, or that he was not bound to pay it. Webb went to John S. Weaver as he was directed, who told him all was right, to make the calculation, and he would have it arranged as he wished, and in a day or two he returned to him the two notes signed with the names of himself and his father, for an amount equal to the note he had presented to Isham Weaver; and Isham Weaver admits in his testimony that the note now sued on is dated about the time of the call on him by Webb, when he directed him to see John S. Weaver. When this note was presented to Isham Weaver for payment by Mr. Simms, the attorney, he swears that he would have told Simms that the note was not his act, but it involved his son and he was ashamed.

We think the jury were authorized by the evidence to find that John S. Weaver had authority to sign the name of his father to the note, or if not, that the father, by his conduct, ratified the act of the son done without authority, and made it his own act and deed, and that he will not now be heard to deny its validity, when, by his conduct, he has induced others to act upon the belief that all was right. Mr. Chitty, in his treatise on Bills of Exchange, p. 27, lays down the rule as follows: "A person may become drawer, endorser or acceptor, not only by his own immediate act, but also by that of his agent or partner. When a party insists that his name has been forged he may resist the payment at law or file a bill in equity. If he intend to resist the payment he should immediately, after hearing his handwriting has been imitated, give public notice, cautioning persons from taking bills or notes with his name thereon without first applying to him."

In Barber v. Gingell, 3 Esp. N. P. C., p. 60, it was held as follows: "Action against the defendant as acceptor, who proved that the acceptance was forged by Taylor, the drawer, in answer to which it was proved that the defendant had been connected in business with Taylor, and that he had paid several bills drawn as the present, by Taylor, and to which Taylor (as it was supposed) had written the acceptance. And Lord Kenyon held, that this was an answer to the case of forgery set up by the defendant; for though he might not have accepted the bill, he had adopted the acceptance and thereby made himself liable to pay the bill." See Chitty on Bills, p. 31 note. Section 2166 of the code declares that: "A ratification by the principal relates back to the act ratified, and takes effect as if originally authorized. A ratification may be express or implied from the acts or silence of the principal."

As Isham Weaver was silent when the note was presented to him by Webb, and said nothing to notify Webb that the note he held and presented on him and John S. Weaver, was not genuine as to him, but referred him to John, who promptly agreed to divide the note and give the two smaller notes as desired, and soon after

brought the notes, with the name of himself and his father upon them, we think this silence misled Webb and caused him to accept the new notes for the old one, and to give further time, when if the truth had been told, he, or those whom he represented, would most probably have taken steps to secure the amount while John S. Weaver had property. Under the state of facts made by this record and the authorities referred to, we are of the opinion that the court below did not err in refusing to set aside this verdict, and grant a new trial.

Judgment affirmed.

EBERTS AND ABBOTT v. SELOVER.

1880. SUPREME COURT OF MICHIGAN. 44 Mich. 519.

COOLEY, J.—This is an action brought to recover the subscription price of a local history. The subscription was obtained by an agent of the plaintiffs and defendant signed his name to a promise to pay ten dollars, on the delivery of the book. This promise was printed in a little book made use of for the purpose of obtaining such subscriptions, and on the opposite page, in sight of one signing, was a reference to "rules to agents," printed on the first page of the book. One of these rules was that "no promise or statement made by an agent which interferes with the intent of printed contract shall be valid," and patrons were warned under no circumstances to permit themselves to be persuaded into signing the subscription unless they expected to pay the price charged. From the evidence, it appears that when Schenck, the agent, solicited his subscription, the defendant was not inclined to give it, but finally told the agent he would take it provided his fees in the office of justice, then held by him, which should accrue from that time to the time of delivery of the book, should be received as an equivalent. The agent assented, and the defendant signed the subscription, receiving at the same time from the agent the following paper:

Coldwater, April 29, 1878.

Mr. Isaac M. Selover gives his order for one copy of our history, for which he agrees to pay on delivery all the proceeds of his office as justice from now till the delivery of said history.

Eberts & Abbott, per Schenck.

The plaintiffs claim that the history was duly delivered, and they demand the subscription price, repudiating the undertaking of the agent to receive anything else, as being in excess of his authority and void. The defendant relies on that undertaking, and has brought into court $4.27 as the amount of his fees as justice

brought the notes, with the [illegible] thereon, on which [illegible] upon them, we think the [illegible] Weaver was [illegible] to accept the new notes for the old, and [illegible] other case when it [illegible] would most probably [illegible] to secure the amount while John S. Weaver had [illegible] Under the state of facts made by this record and the [illegible] entered [illegible] of the opinion that the court below [illegible] certainly [illegible] set aside this verdict, and grant a new trial.

Judgment reversed.

ABBOTT v. SELOVER.

Supreme Court of Michigan. 44 Mich. 519.

Covenant [illegible] action brought to recover the subscription price of [illegible] The subscription was obtained by [illegible] and defendant signed his name to a promise [illegible] delivery of the book. This promise was [illegible] a printed slip [illegible] for the purpose of obtaining [illegible] on the opposite page, in sight of one signing, [illegible] "rules to agents" printed on the first [illegible] of these rules was that "no promise or [illegible] which interferes with the intent of printed [illegible] shall be valid," and patrons were warned under no circumstances to allow themselves to be persuaded into signing the subscription [illegible] expected to pay the price charged. Upon the [illegible] which Schenck, the agent, solicited his subscription, the [illegible] was not inclined to give it, "but finally told me [illegible] rule it provided his fee in the case of [illegible] [illegible] which should occur from that time on the time of delivery of the book, should be received as an equivalent. The agent [illegible] and the defendant signed the subscription, receiving a [illegible] from the agent the following paper:

"Coldwater, April 29, 1878.

"Mr. Isaac M. Selover will [illegible] the copy of our history for which he agrees to pay on delivery all the proceeds of his sales as [illegible] from now till the recovery of said history.

"Lewis B. Abbott, per Schenck."

The plaintiff's claim was that the history was duly delivered, and that [illegible] the subscription price, repudiating the understanding of the agent to receive [illegible] due, or being in excess of the authority and void. The defendant relies on that understanding, and has brought into court $4.47 as the amount of his fees as justice

for the period named. This statement of facts presents the questions at issue, so far as they concern the merits.

It may be perfectly true, as the plaintiff insists, that this undertaking of the agent was in excess of his authority; that the defendant was fairly notified by the entries in the book of that fact, and that consequently the plaintiffs were not bound by it, unless they subsequently ratified it. Unfortunately for their case, the determination that the act of the agent in giving this paper was void does not by any means settle the fact of defendant's liability upon the subscription.

The plaintiffs' case requires that they shall make out a contract for the purchase of their book. To do this, it is essential that they show that the minds of the parties met on some distinct and definite terms. The subscription standing alone shows this, for it shows, apparently, that defendant agreed to take the book and pay therefor on delivery the sum of ten dollars. But the contemporaneous paper given back by the agent constitutes a part of the same contract and the two must be taken and considered together. Bronson v. Green, Walk. Ch. 56; Dudgeon v. Haggart, 17 Mich. 273. Taking the two together it appears that the defendant never assented to any purchase except upon the terms that the plaintiffs should accept his justice's fees for the period named in full payment for the book. If this part of the agreement is void, the whole falls to the ground, for defendant has assented to none of which this is not a part. When plaintiffs discovered what their agent had done, two courses were open to them: to ratify his contract, or to repudiate it. If they ratified it, they must accept what he agreed to take. If they repudiated it, they must decline to deliver the book under it. But they cannot ratify so far as it favors them, and repudiate so far as it does not accord with their interests. They must deal with the defendant's undertaking as a whole, and cannot make a new contract by a selection of stipulations to which separately he has never assented.[1]

The judgment must be affirmed with costs.

The other justices concurred.

[1] "The law is well settled that the principal cannot, of his own mere authority, without the consent of the other party, ratify a transaction by his agent in part, and repudiate it as to the rest. He must either adopt the whole or none. And hence, the general rule is deduced, that where a ratification is established as to a part, it operates as a confirmation of the whole of that particular transaction of the agent." Miller, J., in Krider v. Trustees of Western College, 31 Ia. 547, 550.

Section 3.—Effects of Ratification.

COMMERCIAL BANK OF BUFFALO v. WARREN.

1857. Court of Appeals of New York. 15 N. Y. 577.

This action was brought in the former recorder's court of Buffalo, against the defendant, as one of the firm of Smith & Warren, the other partner having been discharged under the bankrupt law of 1841. Upon the trial the following facts were proved. Smith and Warren were law partners; Smith made his individual promissory note for $216.69, payable to the order of Smith & Warren; endorsed the same in the firm name; and procured it; to be discounted by the Commercial Bank of Buffalo, of which he was then a director and the legal counsel. The note was made by Smith, for his individual benefit, and for no purpose connected with the business of the firm. It was endorsed by him in the firm name, without the knowledge, consent or authority of Warren, who never received any benefit therefrom. All these facts were known to the plaintiff at the time the note was discounted, and the endorsement was made by Smith at its suggestion. After the note became due, and the defendant was charged as endorser, he repeatedly admitted that he was liable upon the note, and promised to pay the same. The recorder, under exception, directed the plaintiff to be nonsuited. Upon appeal to the supreme court, the judgment of the recorder's court was reversed, and a new trial ordered. The defendant appealed to this court.

Johnson, J.—It was proved that the endorsement of Smith & Warren, on which the defendant is sought to be charged, was written by Smith, the maker of the note, without the knowledge, consent, or authority of the defendant, for Smith's own individual benefit, and for no purpose connected with the business of the firm of Smith & Warren, and neither for the benefit of the firm, nor Warren; and that all these facts were known to the plaintiff at the time of the endorsement. Upon these facts no question is made, nor could any be made, of Warren's being not liable. There is proof of several subsequent promises on the part of Warren to pay the note, and of acknowledgments of his liability as endorser; but there is no proof in respect to the existence of any independent consideration moving to him or from the plaintiff. If, therefore, any independent consideration is necessary to sustain his liability, the plaintiff must fail. If there had been an original assent, on the part of the defendant, to the endorsement, he would have been bound by it, even if the note had been taken by the bank on account of a precedent debt as collateral security. (Bank of Rutland v. Buck, 5 Wend. 66.) That would have presented the common case of an accommodation endorser, whose obligation has been used as he intended it should be. Yet, in that

Section 3.—Effects of Endorsement

[illegible]

[illegible]

[illegible]

case, there would have been no consideration moving to him, nor from the plaintiff. It would have stood upon the consideration existing between Smith and the bank. That being so, I see no reason why his subsequent assent should not place him in the same position. The maxim is certainly general, that a ratification is equivalent to a prior authority; and I do not find that it has ever been held that any special sort of ratification is necessary, when the act to be ratified is the giving, in the name of the principal, an accommodation note or endorsement. In many of the cases in which the responsibility of one partner, upon the signature of the firm name by another partner, out of the firm business, has been litigated, the creditor has been held chargeable in law with notice of that fact; and has, therefore, been put to show a special assent to the use of the firm name in that way. The creditor is in no worse position because he appears to have known in fact in this case, what in the others he was held bound in law to know. In those cases a subsequent ratification has been frequently said to be sufficient to charge the partner who had not authorized the use of his name; and it has never been suggested that to make such a ratification effectual, an independent consideration was necessary. (Sweetser v. French, 2 Cush. 315; Wilson v. Williams, 14 Wend. 158; Nixon v. Palmer, 4 Seld. 398.) Indeed, unless there is a general exception of accommodation paper, made by an agent in the name of his principal, from the ordinary rules which are applicable to acts done by an unauthorized agent, there is no question about the defendant's responsibility. Where the unauthorized act is apparently for the benefit of the principal, a very slight matter will serve to make out a ratification; where the act is not apparently for his benefit, clearer evidence of ratification should be required. When, however, it plainly appears, that he does mean to ratify that which has been done in his name, the law does not compel us to deny him the privilege. He must be taken to have considered for himself whether the act done was, on the whole, such as he approves, and desires to be bound by. Such a case may have presented itself to him as is referred to by Lord Eldon, in Ex Parte Bonbonus, cited in Gansevoort v. Williams (14 Wend. 140): "In many cases of partnership and different private concerns, it is frequently necessary for the salvation of the partnership that the private demand of one partner should be satisfied at the moment." And as such considerations would properly have great weight with a partner in assenting originally to the use of his name, by and for the benefit of his copartner, I see not why this may not also be allowed to weigh, when he comes to consider whether he will or will not be bound by a use of his name by his partner, though originally unauthorized.

The judgment should be affirmed.

SELDEN, J.—It is a part of the established doctrine of the law of agency, that a subsequent ratification by the principal of the previous unauthorized act of an agent, or of one assuming to be such, is in all

respects equivalent to an original authority. This doctrine has been repeatedly applied to cases of the unauthorized use of the partnership name, by one of the partners, for his own private benefit. It is, however, contended by the defendant's counsel, that the ratification in such cases operates not directly, but merely as presumptive evidence that the act was originally done by the authority of the principal.

Were this position established, it would inevitably follow that the judgment in this case must be reversed; as the evidence of a want of authority is so conclusive, as effectually to repel any contrary inference to be drawn from the subsequent assent of the defendant.

But this view of the *modus operandi* of a ratification, is not sustained by the authorities. On the contrary, they all proceed upon the assumption that a ratification is, *per se*, a confirmation of the act of the agent. In none of the cases do I find it intimated that it operates merely as evidence of an original authority; nor have I met with any case in which the usual effect of a ratification was prevented, by proof of an actual want of authority on the part of the agent.

Whether or not, therefore, the doctrine that a ratification is not merely evidence of, but equivalent to, an original authority, can be made to harmonize with the general principles and analogies of the law, it appears to be too firmly established to be shaken. Of its applicability to the present case there is no doubt. It is clear, also, that no valid distinction can be taken between a ratification of and a promise to perform the engagement entered into by the agent. The substance of the ratification consists, in all cases, in the consent of the principal to be bound by the act of the agent. Nor do I see that the effect of the defendant's voluntary assumption, in this case, of the obligation ostensibly imposed upon him by the act of his partner, can be prevented by the knowledge, on the part of the plaintiff, of the want of authority of such partners. No such distinction is suggested in any of the cases, although in some of them, the fact that the agent had exceeded his powers, must have been either actually or presumptively known to the plaintiff.

My conclusion therefore is, that the judgment of the supreme court should be affirmed.

SHANKLAND, J.—If the bill of exceptions must be considered as containing the statement of facts established on the trial, instead of the evidence of facts, then the judge at the trial correctly denied the plaintiff's request to submit to the jury the question of Smith's authority to endorse the defendant's name on the note. The supreme court granted the new trial upon that point, but seemed not to have adverted to the language of the bill of exceptions, and to have confounded it with a case. Treating it as a case, and the proof as mere evidence, they were justified in granting a new trial; for there was abundant evidence to go to the jury and to justify them in finding an original authority to Smith to endorse the firm name on the note. But I am of opinion the bill of exceptions must be considered as contain-

ing a statement of facts, the result of evidence, and that it must be considered as a conceded fact that Smith had no authority from the defendant to use his name at the time the endorsement was made. The new trial cannot be sustained on the basis assumed by the supreme court. It becomes necessary, therefore, to examine the other grounds urged by the respondent to support the order for a new trial.

The plaintiff proved that after the note fell due, or about that time, the defendant admitted in express terms that he was liable on the note as endorser, and promised to pay it. This raises the question whether, when one member of a co-partnership endorses his own note (given in form to the firm) with the firm name, without the knowledge or assent of his partner, and for his individual benefit, and these facts are known to the bank which discounts it, the firm can be made liable by a subsequent assent thereto and promise to pay the same.

The authorities all speak one language on the subject, and affirm that the firm is liable. The same rule prevails in the case of an assumed agent professing to act for a principal. Story on Agency, § 253, states the rule thus: "So, if a person should sign or endorse a note, as agent for another, without authority, and the principal should afterwards, upon full knowledge, promise to pay it accordingly, that would amount to a ratification of the act." (Byles on Bills 34; 2 Penr. & Watts' P. R. 160-177; Sweetzer v. French, 2 Cush. 309; 9 Ala. 313; 3 Humph. 597; 10 Verm. 268; 4 Seld. 398.)

But it is objected by the appellant's counsel that, in order to be bound by the subsequent ratification, there should be a consideration to support it. In none of the cases cited is the subject of a consideration, to support the promise of ratification, alluded to as necessary. But it has been held that it is not necessary to ratify in writing, although a writing was necessary to the validity of the original agreement; and I am of opinion that no new consideration is necessary to sustain the ratification. (McClean v. Dunn, 4 Bing. 722; Davis v. Shields, 24 Wend. 325; Lawrence v. Taylor, 5 Hill 107.) By the act of ratification, the parties are placed in the same position, in all respects, as if the contract had been originally authorized.

If the defendant would have been liable on this note, had he authorized his name to be used by Mr. Smith at the time the endorsement was made, he is liable now. Of his liability, under such circumstances, there can be no doubt. The judgment should be affirmed and a new trial ordered, with costs to abide the event.

All the other judges concurring.

Judgment affirmed.[1]

[1] "The rule of law, that *omnis ratihabitio retrotrahitur*, etc., seems only applicable to cases where the conduct of the parties on whom it is to operate, not being referable to any agreement, cannot in the meantime depend on whether

REYNOLDS v. DOTHARD et al.

1847. Supreme Court of Alabama. 11 Ala. 531.

Error to the chancery court of Talladega.

The bill was filed by the plaintiff in error, and states, in substance, that T. & W. Dothard recovered before a justice of the peace of Randolph county, four judgments for $50 each, against one Weir, and one Adrian, from which an appeal was prayed by Weir, to the next county court of Randolph, and a bond executed in the penal sum of $455, conditioned to prosecute an appeal on the judgments so obtained, to which the name of the plaintiff in error was signed, without his knowledge or consent. That he never saw the bond until after the rendition of a judgment upon it against him in the county court, as surety for the appeal, and that he did not execute it, or authorize any one, either verbally or in writing, to execute it in his name, and that it is a base forgery. That Adrian, a party to the notes, has property sufficient to satisfy the judgment, but that the sheriff is about to levy and sell his property to satisfy it. Weir having absconded, etc. An injunction was decreed according to the prayer of the bill.

Thomas Dothard, one of the firm of T. & W. Dothard, answered the bill, and as the material allegation of the forgery of the complainant's name denies all knowledge of the facts, but states his belief, and charges, that Weir had full authority to sign the name of complainant to the appeal bond.

Adrian also answers, and states that he was merely the surety of Weir. He denies all knowledge of the alleged forgery, but states his belief from information, that if Weir did sign the name of complainant to the bond, he was authorized to do so; and that Weir, when he left the state, placed funds in the complainant's hands to satisfy the judgment.

Judgments *pro confesso* were taken against the other defendants.

The testimony which was taken in the cause is sufficiently noticed in the opinion of the court.

The cause coming on to be heard before the chancellor, on bill, answers, and proof, he considered that the evidence established a parol authority to Weir to execute the bond in his name, a subsequent ratification of it by him, and also that Weir had placed funds in his hands to discharge the judgment, and decreed that he should be compelled in equity to confirm, and give validity to the appeal bond, and dismissed the bill.

An appeal is prosecuted from this decree to this court, and is now assigned as error.

there be a subsequent ratification." Lawrence, J., in Right v. Cuthell, 5 East 491, 499.

CHANDLER, J.—We shall not [illegible] parol authority would be sufficient in any case to authorize the execution by an agent of a bond in the name of the principal. In this case [illegible] was a ratification by the principal [illegible] done, with full knowledge of all the facts. The effect of such ratification is, in general, as extensive and [illegible] given to the act. Much more [illegible] to be the case where [illegible] to be affected by it are not in any manner connected with the act of the agent, or affected with knowledge of the [illegible] thereto. The consequence in this [illegible] the surety [illegible] agent had been legally authorized to execute the bond. [illegible] has been jeopardized, precisely as it would have been if the principal had executed the bond in person and his consequence has resulted not from any trust reposed by them in the agent, but by the consent of the plaintiff and his agent, for such he was, though unknowingly authorized to act for him. In such a case, a ratification of the act when done, with full knowledge of the facts, should have the same effect as if the agent had been duly authorized to the first [illegible]

WILLIAMS ET AL. v. BUTLER ET AL.

1864. SUPREME COURT OF ILLINOIS. 25 Ill. 544.

BREESE, J.—Strong Wadsworth and James Wadsworth, in the year 1857, failed in business in Chicago, having open accounts as bankers. They were indebted to Williams [illegible] eight thousand dollars. In February, 1857, Strong Wadsworth and one John C. Ambler entered into an arrangement [illegible] by furnished to the former the sum of fifteen hundred [illegible] dollars, belonging to his mother, Mary Ambler, [illegible] Pennsylvania, and Wadsworth recommenced the [illegible] in Chicago, under the name of S. Wadsworth & Co. [illegible] contract was entered into between Ambler, acting as agent for his mother

[illegible]

[illegible]

REYNOLDS v. DOTHARD et al.

1847. October 6th.—Appeal from Circuit Court of Randolph.

[illegible] to the [illegible] Talbott.

This bill was [illegible] in substance, that T. & W. Dothard had been [illegible] of the peace of Randolph county, [illegible] for the sum of [illegible] against one Weir, and on [illegible] to appeal was entered by Weir, to the next county court, [illegible] and a bond executed in the penal sum of $150, [illegible] the appeal, the judgment [illegible] the appeal bond was signed without the knowledge [illegible] That to secure said the bond [illegible] after the [illegible] signed upon a [illegible] him in the county court [illegible] and [illegible] did not execute it, or authorize [illegible] to execute it in his [illegible] that [illegible] a party to the [illegible] to satisfy the judgment, but that the [illegible] on his property to satisfy it. Weir having [illegible] commission was devised according to the [illegible]

[illegible] the firm of T. & W. Dothard, answered [illegible] ignorance of the forgery of the complainant's [illegible] of the facts, but states his belief, and [illegible] authority to sign the name of complainant

[illegible] states that he was merely the surety of [illegible] the alleged forgery, but states his belief [illegible] Weir had signed the name of complainant to the [illegible] to do so, and that Weir, when he left the [illegible] the commissioner's hands to satisfy the judgment.

Judgments [illegible] taken against the other defendants.

[illegible] in the cause is sufficiently noticed in the opinion of the court.

The [illegible] heard before the chancellor on bill, answers, and proofs, [illegible] that the evidence established a good authority [illegible] the bond in his name, a subsequent ratification of it [illegible] that Weir had placed funds in his hands to discharge the [illegible] and decreed that he should be compelled to [illegible] and give a solidus to the appeal bond, and dismissed the bill.

An appeal is prosecuted from the decree in this cause, and is now assigned as error.

[illegible] for a statement of the facts, see Reynolds v. Caldwell, 5 East. 360, 369.

ORMOND, J.—We shall not inquire whether a parol authority would be sufficient in any case to authorize the execution by an agent of a bond in the name of his principal, because in this case there was a ratification by the principal of the act after it was done, with full knowledge of all the facts. The effect of such ratification is, in general, an admission that the agent had the necessary power to do the act. Much more so should this be the rule when, as in this case, those to be affected by it are not in any manner connected with the act of the agent, or affected with knowledge of his want of authority. The consequence to them is precisely the same as if the agent had been legally authorized to execute the bond. Their debt has been jeopardized, precisely as it would have been if the plaintiff had executed the bond in person, and this consequence has resulted, not from any trust reposed by them in the agent, but by the conduct of the plaintiff and his agent, for such he was, though informally authorized to act for him. In such a case, a ratification of the act, when done, with full knowledge of the facts, should have the same effect as if the agent had been duly authorized in the first instance.[1] * * *[2]

WILLIAMS ET AL. v. BUTLER ET AL.

1864. SUPREME COURT OF ILLINOIS. 35 Ill. 544.

BREESE, J.—Strong Wadsworth and James Wadsworth, in the year 1857, failed in business in Chicago, having been partners in banking. They were indebted to Williams, the appellant, about eight thousand dollars. In February, 1861, Strong Wadsworth and one John C. Ambler entered into an arrangement by which the latter furnished to the former the sum of fifteen hundred and eighty dollars, belonging to his mother, Mercy Ambler, residing in Massachusetts, and Wadsworth recommenced the banking business in Chicago, under the name of S. Wadsworth & Co. A written contract was entered into between Ambler, acting as agent for his mother,

[1] A portion of the opinion not dealing with the question of ratification is omitted.

[2] *Accord:* Gulick v. Grover, 33 N. J. L. 463; Lynch v. Smyth, 25 Colo. 103. "Where ratified by the principal, the unauthorized act of his agent is as binding upon him as though previous authority had been conferred upon such agent. The subsequent ratification has a retrospective effect, and is equivalent to a prior command. To say that an agent entered into a contract without authority from his principal, and that the principal subsequently ratified such contract, is, in legal intendment and effect, the equivalent of saying the agent was duly authorized to make the contract." Searls, C., in Kraft v. Wilson (Cal.), 37 Pac. 790, 792.
See Dingley v. McDonald, 124 Cal. 682.

and Wadsworth, by which Wadsworth was to attend to the business on a salary of ten dollars per week, and to have an interest therein beyond his wages, the profits and losses to accrue to Mercy Ambler. When, however, they made the first settlement, the profits were found to be larger than had been anticipated, and Ambler allowed Wadsworth one-half the profits instead of the salary, and the business continued, afterwards, upon the basis of a partnership between Wadsworth and Mrs. Ambler. The entire capital was furnished by Mrs. Ambler. It appears that John C. Ambler was acting as manager of his mother's affairs, and that she was, to some extent, dependent on him for support, although she had some small means which he invested and controlled for her benefit, and which he sought to keep distinct from his own funds. This arrangement with Wadsworth was made without her knowledge, and she knew nothing of it, until the occurrence of the events which led to this suit. In making the arrangement, John C. Ambler was merely acting under his power as general agent.

In December, 1862, appellant commenced suit against Strong Wadsworth and James Wadsworth, on his old claim against them, and in March, 1863, recovered a judgment against Strong Wadsworth (James not having been served) for over nine thousand dollars. An execution was immediately issued and levied upon the furniture and money found in the office of S. Wadsworth & Co. The money levied on, amounting to over six thousand dollars, was paid over by the sheriff to appellant, the plaintiff in the execution. Immediately after the levy, judgments were confessed by Strong Wadsworth and Mercy Ambler as follows: One in favor of Rutter *et al.* for three thousand and three $\frac{75}{100}$ dollars, one in favor of Tyler *et al.* for eighteen hundred and sixty-six $\frac{90}{100}$ dollars, and one in favor of Marshall *et al.* for sixteen hundred dollars, and after an ineffectual attempt to recover by writ of replevin the property levied on, Rutter *et al.* filed a bill in behalf of themselves and the other creditors of S. Wadsworth & Co. praying that the property levied on be decreed to be the partnership property of Strong Wadsworth and Mercy Ambler, and, as such, marshaled in payment of their creditors, to the exclusion of the individual creditors of Wadsworth. Appellants Wadsworth, Mercy Ambler and the sheriff were made defendants to this bill. Williams and the sheriff answered, denying the alleged partnership between Wadsworth and Mrs. Ambler, the oath to their answer having been waived. Mrs. Ambler answered, admitting the alleged partnership, and she also filed a cross-bill setting up the partnership, and praying that the partnership assets might be applied in payment of partnership debts. On the final hearing the court below so decreed, and Williams brings the record to this court. It should be further stated that Strong Wadsworth and Mrs. Ambler

are admitted to be insolvent, and that the former had drawn all the profits due to him from the business.

It is apparent, from this statement of the facts, that the decision of this case depends upon the effect to be given to the answer and cross-bill of Mrs. Ambler, by which she ratifies the act of her agent in making the partnership arrangement with Wadsworth. It is denied, however, in the first instance, by the counsel of appellant, that she has legally ratified, there being no proof of authority from her to her attorneys to file the answer or cross-bill, and no proof of her signature to these pleadings which are signed by her in her own proper name.

It is sufficient to say in regard to this, that, in the absence of proof to the contrary, the authority of an attorney of this court to appear and plead for such parties as he claims to represent is presumed. If the appellants desired to raise this question in the court below, or to impeach the genuineness of Mrs. Ambler's own signature to the answer and cross-bill, they should have filed an affidavit and asked for the proper rule. Not having done this, they cannot now deny the authority of Mrs. Ambler's counsel to file such answer and cross-bill as they thought proper.

The other question is more difficult, but we have arrived at the conclusion, that the ratification of Mrs. Ambler makes the arrangement between her son and Wadsworth good from the beginning. So far as appears, he had no authority to create a partnership between her and another person, but if an agent assumes to do an act of this sort, it may, like any other act of an agent not unlawful, be ratified by the principal, and the ratification relates back to the performance of the act. It is urged, however, that a ratification cannot relate back so as to cut off the intervening rights of third persons. That is doubtless true as a general rule, but if the doctrine of relation is applied merely for the protection of a clearly superior equity, such application would be consistent with recognized legal principles, even though it interferes with the claims of third person resting upon an inferior equity. We consider the case before us one of that character. The debt of Williams accrued long before John C. Ambler undertook to create a partnership between his mother and Wadsworth. The credit upon which it accrued did not spring from any control which the latter acquired over the property of Mrs. Ambler. So far as she and her property are concerned, the contracting of the debt had no connection with them. Williams, as creditors of Wadsworth was placed in no worse position in consequence of the acts of Mrs. Ambler's agent in forming the partnership, whether such acts were authorized by the principal or not. But how was it with the complainants, the creditors of the firm? Their debts arose in consequence of money paid by them to S. Wadsworth & Co., for bills of exchange on New York, on the same day with the levy by the sheriff, and the identical money paid by them

was part of that seized under the levy. Mrs. Ambler, by giving to Wadsworth the control of her small capital, through her agent, had enabled him to start the business of S. Wadsworth & Co., and procure credit, by selling drafts to these complainants and the other creditors. Although Mrs. Ambler was under no legal obligation to ratify these proceedings of her agent when they came to her knowledge, yet she was under a certain moral obligation to protect, to the extent of her power, those innocent creditors who had become such, through means furnished by her, and through the acts of her general agent. She recognizes this duty, and by ratifying the act of her agent, has made herself personally liable, as a partner in the firm of S. Wadsworth & Co., for the debts of the firm, and is now liable to be sued therefor. Wright v. Boynton & Hayward, 37 N. H. 9. These are debts which would have had no existence, but for the acts of her agent in dealing with her property, and connecting her in a partnership arrangement with Wadsworth. If she is now willing to ratify this arrangement, and assume all the liabilities of the firm of S. Wadsworth & Co., *ab initio,* as she does by ratifying, is it not manifestly just that the other incidents of partnership should follow, and the partnership assets be first applied to the payment of the partnership debts? Is it not plain that the equity of the creditors of S. Wadsworth & Co., as against the assets of the business done under that name, and as against the capital furnished by Mrs. Ambler, is superior to that of individual creditors of Wadsworth, whose debts were contracted long before this business was commenced? If Mrs. Ambler is willing to ratify the acts of her agent, are not their equities, as against Williams, precisely what they would have been if he had full authority to do what he did? We think so, and it follows that the lien of Williams' execution must be treated, in a court of equity, as only attaching to whatever interest Wadsworth had in the assets of the firm, after the payment of the firm debts.

The decree of the superior court must be affirmed.

Decree affirmed.[1]

[1] "Now, although the general rule is, that the ratification relates back to the time of the inception of the transaction, and has a complete retroactive efficacy, or as the maxim is—*Omnis ratihabitio retrotrahitur*—yet, this doctrine is not universally applicable. Thus, if third persons acquire rights, after the act is done and before it has received the sanction of the principal, the ratification cannot operate retrospectively, so as to overreach and defeat those rights." Baldwin, J., in Taylor v. Robinson, 14 Cal. 396, 400.

See Kempner v. Rosenthal, 81 Tex. 12.

WALTER v. JAMES.

1871. Court of Exchequer. L. R. 6 Ex. 124.

The defendant being indebted to the plaintiff, S., who had acted as his attorney in the matter of the plaintiff's claim (the amount of which was disputed) but whose authority has been countermanded, paid to the plaintiff 60*l* in discharge of the disputed claim. The plaintiff afterwards, at the request of S., and before any ratification by the defendant, repaid to S. the 60*l*, and sued the defendant for the debt. The defendant pleaded as to 60*l* payment, and relied upon the payment made by S.:

Held, that it was competent to the plaintiff and S., before ratification by the defendant, to cancel what they had done, and that the plea of payment was therefore not proved.

Kelly, C. B.—[After stating the facts of the case, proceeded:—] Southall, therefore, in paying the debt, appeared to act as the defendant's agent; but it turned out afterwards that although he had originally been authorized by the defendant to come to an arrangement with the plaintiff, and to make this payment, that authority had been revoked before the payment was made. He did not, however, communicate to the plaintiff that he had no authority; on the contrary, he professed to act for the defendant, and the plaintiff believed him to be so acting, and received the sum paid in full satisfaction of his debt. But when the plaintiff found that the money had been paid without the defendant's authority, he returned the money to Southall. And now the question is, whether the defendant can by his plea of payment adopt and ratify the act of Southall, although before action that act had, by arrangement between the plaintiff and Southall, been undone.

Now the law is clear, that where one makes a payment in the name and on behalf of another without authority, it is competent for the debtor to ratify the payment; and there seems to be no doubt on the authorities that he can ratify after action by placing the plea of payment on the record.

Prima facie, therefore we have here a ratification of the payment by the defendant's plea; but whether the payment was then capable of ratification depends on whether previously it was competent to the plaintiff and Southall, apart from the defendant, to cancel what had taken place between them. I am of opinion that it was competent to them to undo what they had done. The evidence shows that the plaintiff received the money in satisfaction under the mistaken idea that Southall had authority from the defendant to pay him. This was a mistake in fact, on discovering which he was, I think, entitled to return the money, and apply to his debtor for payment. If he had insisted on keeping it, the defendant might at any moment have repudiated the act of Southall, and Southall

would then have been able to recover it from the plaintiff as money received for Southall's use. I am, therefore, of opinion that the plaintiff, who originally accepted this money under an entire misapprehension, was justified in returning it, the position of the parties not having been in the meantime in any way altered, and that the defendant's plea of payment fails. The rule must accordingly be made absolute.

Martin, B.—I am of the same opinion. The rule which I conceive to be the correct one may be stated as follows: When a payment is not made by way of gift for the benefit of the debtor but by an agent who intended that he should be reimbursed by the debtor but who had not the debtor's authority to pay, it is competent for the creditor and the person paying to rescind the transaction at any time before the debtor has affirmed the payment, and repay the money, and thereupon the payment is at an end, and the debtor again responsible. This being, in my judgment, the true rule, the plaintiff in this case was entitled to recover.

Kelly, C. B.—My brother Cleasby concurs in the judgment of the court.

Rule absolute.[1]

DIXON, C. J., in DODGE v. HOPKINS.

1861. Supreme Court of Wisconsin. 14 Wis. 630.

* * * We are next to ascertain the effect of this want of authority upon the rights of the defendant. It is very clear, in the present condition of the case, that the plaintiff was not bound by the contract and that he was at liberty to repudiate it at any time before it had actually received his sanction. Was the defendant bound? And if he was not, could the plaintiff, by his sole act of ratification, make the contract obligatory upon him? We answer both these questions in the negative. The covenants were mutual—those of the defendant for the payment of the money being in consideration of that of the plaintiff for the conveyance of the lands. The intention of the parties was that they should be mutually bound—that each should execute the instrument so that the other could set it up as a binding contract against him, at law as well as in equity, from the moment of its execution. In such cases it is well settled, both on principle and authority, that if either party neglects or refuses

[1] "It is a familiar maxim that ratification has a retroactive efficacy, and relates back to the inception of the transaction, and, when deliberately made with a knowledge of the circumstances, as before stated, cannot be revoked or recalled." Maxey, J., to jury in Russ v. Telfener, 57 Fed. 973, 974.

To same effect see Whitfield v. Riddle, 78 Ala. 99.

would then have been able to recover [illegible] from the plaintiff as money received for Spalding's use. I am therefore of opinion that the plaintiff, who [illegible] upon the [illegible] of entry as appears on the [illegible] of returning [illegible] the premises of the lessee not having been [illegible] mentioned to [illegible] altered, and that the defendant [illegible] payment from [illegible] rule must accordingly be made absolute.

MARTIN, B.—I am of the same opinion. The rule which I conceive to be the correct [illegible] be laid is this: Where a payment is not made [illegible] to the [illegible] of the debtor but by an agent who [illegible] but he should be authorized by the debtor [illegible] agent's authority to pay, it is [illegible] for the [illegible] person having to refund the transaction at any rate [illegible] debtor has adopted the payment, and regard the [illegible] from the payment [illegible] end, and the debtor [illegible] being, in my judgment, the true rule, the plaintiff is [illegible] entitled to recover.

[illegible] concur in the judgment of the Court.

[illegible] v. HODGE & HOPKINS.

[illegible] Wednesday, 14 Wil. 6ye.

[illegible] in the case at the suit of authority upon the [illegible] plaintiff. It is very clear, in the present condition of the case, that the plaintiff was not bound by the contract and that he [illegible] to repudiate it at any time before it had actually [illegible] action. Was the defendant bound? And if he was not [illegible] plaintiff, by his sole act of satisfaction, make the contract [illegible] you [illegible]? We answer both these questions in the [illegible] covenants were mutual—those of the defendant for the payment of the money being in consideration of that of the plaintiff for the conveyance of the lands. The intention of the parties [illegible] should be mutually bound—that each should execute [illegible] so that neither could set it up as a binding contract [illegible] bringing suit in equity, from the moment of its execution. In such cases it is well settled, both on principle and authority, that [illegible] neglects or refuses

[illegible] a certain number of [illegible] a specified [illegible], and refuses [illegible] to the completion of the [illegible], and even if he [illegible] made a [illegible] of the [illegible] which could [illegible] rescinded or avoided." Story, J., in [illegible] Sim. & Tatlow, 57 Fed. 973, 974.

[illegible] Wilson v. [illegible], 20 Ala. 95.

to bind himself, the instrument is void for want of mutuality, and the party who is not bound cannot avail himself of it as obligatory upon the other. Townsend v. Corning, 23 Wend. 435, and Same v. Hubbard, 4 Hill 351, and cases there cited. The same authorities also show that where the instrument is thus void in its inception, no subsequent act of the party who has neglected to execute it, can render it obligatory upon the party who did execute, without his assent. The opinion of Judge Bronson in the first named case is a conclusive answer to all arguments to be drawn from the subsequent ratification of the party who was not originally bound. In that case as in this, the vendors had failed to bind themselves by the agreement. He says: "It would be most extraordinary if the vendors could wait and speculate upon the market, and then abandon or set up the contract as their own interests might dictate. But without any reference to prices, and whether the delay was long or short, if this was not the deed of the vendee at the time it was signed by himself and Baldwin (the agent), it is impossible that the vendors, by any subsequent act of their own without his assent, could make it his deed. There is, I think, no principle in the law which will sanction such a doctrine." The only point in which the facts in that case differ materially from those here presented, is, that no part of the purchase money was advanced to the agent. But that circumstance cannot vary the application of the principle. The payment of the money to the agent did not affect the validity of the contract, or make it binding upon the plaintiff. He was at liberty to reject the money, and his acceptance of it was an act of ratification with which the defendant was in no way connected, and which, although it might bind him, imposed no obligation upon the defendant until he actually assented to it. It required the assent of both parties to give the contract any vitality of force.

I am well aware that there are dicta and observations to be found in the books, which, if taken literally, would overthrow the doctrine of the cases to which I have referred. It is said in Lawrence v. Taylor, 5 Hill 113, that "such adoptive authority relates back to the time of the transaction, and is deemed in law the same to all purposes as if it had been given before." And in Newton v. Bronson, 3 Kern. 594, the court say: "That a subsequent ratification is equally effectual as an original authority, is well settled." Such expressions are, no doubt, of frequent occurrence, and although they display too much carelessness in the use of language, yet if they are understood as applicable only to the cases in which they occur, they may be considered as a correct statement of the law. The inaccuracy consists in not properly distinguishing between those cases where the subsequent act of ratification is put forth as the foundation of a right in favor of the party who has ratified, and those where it is made the basis of a demand against him. There is a broad and manifest difference between a case in which a party

seeks to avail himself, by subsequent assent, of the unauthorized act of his own agent, in order to enforce a claim against a third person, and the case of a party acquiring an inchoate right against a principal, by an unauthorized act of his agent, to which validity is afterwards given by the assent or recognition of the principal. Paley on Agency, 192, note. The principal in such case may, by his subsequent assent, bind himself, but if the contract be executory, he cannot bind the other party. The latter may, if he choose, avail himself of such assent against the principal, which, if he does the contract, by virtue of such mutual ratification, becomes mutually obligatory. There are many cases where the acts of parties though unavailable for their own benefit, may be used against them. It is upon this obvious distinction, I apprehend, that the decisions which I have cited are to be sustained. Lawrence v. Taylor and Newton v. Bronson, were both actions in which the adverse party claimed rights through the agency of individuals whose acts had been subsequently ratified. And the authorities cited in support of the proposition laid down in the last case (4 Wend. 219; 1 Pick. 372; 3 Hill 552; 5 *id.* 137; 9 Cranch 153, and 5 Wheat. 241) will, when examined, be found to have been cases where the subsequent assent was employed against the persons who had given it and taken the benefit of the contract. * * *[1]

SHEFFIELD and Others v. LADUE.

1871. Supreme Court of Minnesota. 16 Minn. 388.

Ripley, C. J.—The defendant, a traveling salesman for R. I. Johnson & Co., and having in his possession a pair of horses, the property of his employers, with authority from them to sell or exchange the same, exchanged them with the plaintiffs for a pair of horses belonging to the plaintiffs, and for the agreed difference in value between the two, executed and delivered to the plaintiffs the following note:

"Ninety days after date for value received, we promise to pay to the order of Sheffield and Leary, two hundred dollars, at H. Wilson & Co's bank, with interest at seven per cent.

"Fairbault, April 3d, 1868. R. I. Johnson & Co.,
"Per Jay Ladue."

From the bill of exceptions in the case, it appears that at the trial there was evidence tending to show defendant had no authority

[1] Followed in Atlee v. Bartholomew, 69 Wis. 43. Compare *In re* Portuguese Consol. Copper Mines, Ltd., L. R. 45 Ch. D. 16.

to give the note of said R. I. Johnson & Co., but that plaintiffs supposed he had.

The plaintiffs' counsel requested the court to charge the jury that if they should find that the defendant made the note described in the complaint without having been previously authorized so to do by R. I. Johnson & Co., no subsequent ratification of this act by said firm can exonerate him from liability to the plaintiffs.

The court refused so to do, and plaintiffs excepted.

The court charged the jury that if the defendant gave the note described in the complaint, without being in any way authorized to do so, yet if the firm of R. I. Johnson & Co., afterward, knowing all the facts, ratified this act, the defendant was not liable to this action, to which plaintiffs excepted.

The plaintiffs contend that the defendant having made and delivered this note to the plaintiffs without authority, incurred an immediate liability to them for whatever injury had resulted from his wrongful act, either as on an implied warranty of said authority, or as for a deceit, or on the note itself as maker.

If he is liable on the note it has been held that subsequent ratification would not excuse him, because the note is his note when executed. Rossiter v. Rossiter, 8 Wend. 494; Palmer v. Stephens, 1 Denio 471.

In our opinion, however, the weight of authority is decidedly that one who, without authority, executes an instrument in the name of another whose name he puts to it, and adds his name only as agent for that other, cannot be treated as a party to that instrument and be sued upon it, unless it be shown that he was the real principal. 1 Parsons' Cont., Book 1. Ch. 3, p. 68, 69; Parsons' Mer. Law, Ch. 10, § 5, p. 148; Jenkins v. Hutchinson, 13 Ad. & El. 744; 66 E. C. L. 751; Lyon v. Williams, 5 Gray 557; 2 Smith Lead. Cas. 366, *et seq.;* Collen v. Wright, 40 Eng. L. & Eq. 182; Randell v. Trimen, 37 Eng. L. & Eq. 275; Jeffers v. York, 4 Cush. 371; Stetson v. Patten, 2 Greenl. 358; Abbey v. Chase, 6 Cush. 54; Hopkins v. Mehaffy, 11 Sergt. & R. 126; Moore v. Wilson, 6 Foster (N. H.) 332; Duncan v. Niles, 32 Ill. 542; McHenry v. Duffield, 7 Blackf. 41.

The plaintiffs rely upon Dusenbury v. Ellis, 3 Johns. Cas. 70, and a series of New York decisions, as Rossiter v. Rossiter, above cited and Palmer v. Stephens, 1 Denio 471, and others following that case. These lay down the law as they have stated it, and their authority has been followed in several other states; but in White v. Madison, 26 N. Y. 117, Selden, J., delivering the opinion of the court of appeals says, that the authority of the New York decisions above referred to had been somewhat shaken by the remarks of the judges who delivered opinions in Walker v. Bank of the State of New York, 5 Seldon 582, and that if it were necessary in the case before him to decide whether, as a general principle, one entering into a contract in the name of another without author-

ity, is to be himself holden as a party to the contract, he should hesitate to affirm such a principle. From this language it may fairly be inferred that if the question were now a new one in New York it would probably be differently decided.

If the authorities on which plaintiffs rely would not now be followed where they originated, the courts of a state in which the question is now raised for the first time can hardly be expected to be guided by them if the point is to be settled on the weight of authority. Nor, looking at the question in the light of reason, and not merely on authorities, is it perceived how the objection stated by Mr. Justice Selden is to be got over; viz.: That by such a rule, courts would often make contracts for parties which neither party intended or would have consented to make. Indeed, we think the objection might be more strongly put, viz.: That by such a rule the courts would in every case make a contract for the parties which neither intended, and which in many cases neither would have consented to make.

Why should the court do this? The court of appeals, in Walker v. Bank of State of New York, say, with perfect justice, that the doctrine in question having originated in the decisions referred to, the foundation of the rule must be taken to be as they state it. There can be no doubt that the foundation is what the court of appeals say it is, misrepresentation and imposition. This being so, the next question is, how is a contract which purports to be the contract of A, to be turned into the contract of B?

In the leading case of Dusenbury v. Ellis, this problem is thus solved: If a person, under pretense of authority from another executes a note in his name, he is bound; the party who takes it under such a mistake or imposition, ought to have the same remedy against the attorney who imposes on him, as he would have had against the pretended principal if he had been really bound, and (to give him this remedy consistently with the general theory of contracts) the name of such pretended principal will be rejected as surplusage. Dusenbury v. Ellis, 3 Johns. Cases 70.

That is, the court thus makes a new contract for the parties, because the party imposed on ought to have the same remedy as he would have had against the principal if there had been any principal.

But why ought he to have this remedy, to give him which a court of law takes on itself to exercise an equitable jurisdiction, which a court of chancery would disclaim? Justice does not require it. In an action for damages, the party imposed on can recover full indemnity for all resulting injury, and exemplary damages besides, if a fraudulent intent appears—on the note, the principal and interest only.

The court of appeals admits that it must, in any event, be con-

sidered as a concurrent remedy with the remedy in case, and on the implied warranty. White v. Madison, *supra,* 124.

Why violate the first principles of the law of contracts to give another, it may be, a less effective remedy?

This note, in our opinion, cannot be treated as the note of defendant; neither was it, when executed, the note of his employers. Thereupon an action in the nature of an action on the case lay against defendant for falsely assuming authority to act as agent. Parsons' Mer. Law, 148, and authorities already cited.

But if his employers ratify his unauthorized act in signing their name, the signature becomes theirs, and the note becomes theirs when executed, for the ratification relates back to the execution. The plaintiffs have got what they bargained for, and have no longer any cause of action for damages against the agent. This would not hold good, of course, in cases in which such suit for damages had been brought before ratification, nor in any case in which injury had resulted to plaintiffs from defendant's act before ratification, or in which the effect of making the ratification thus relate back, would be to put the plaintiffs in a worse position than they would have otherwise been in, in consequence of such unauthorized act of defendant.

The bill of exceptions in this case, however, not only does not purport to set out either the evidence or the charge in full, but it contains nothing, aside from the instructions themselves, from which it can be gathered that there was any evidence tending to show that there had been any ratification at all, unless such an inference is to be drawn from the statement that "there was no evidence offered or received on the trial, except such as related to the authority of the defendant to make the note, and the subsequent ratification of this act by R. I. Johnson & Co."

The plaintiff's objections to the instructions given, viz.: That to make the ratification avail, notice of it should have been given to plaintiffs, and that from the language of the instruction they might infer that a ratification after suit commenced would be a defense, would not, of course, arise in the absence of any such evidence.

If it should be thought that it is fairly to be inferred from said statement, that there was evidence tending to prove a ratification, no inference can be drawn as to when such ratification took place. The validity of a ratification does not, in general, depend on its being communicated. Bayley v. Bryant, 24 Pick. 198. Therefore, before the question of notice could become material, it would be necessary to show a state of facts imposing a duty on defendant to notify plaintiffs of such ratification, and damage resulting from his neglect so to do.

If, for example, the ratification was before the demand made by plaintiffs on Johnson & Co., defendant cannot be held responsible

for any error prejudicial to plaintiffs, into which they might be led by the statement of Johnson & Co. in refusing to pay, that defendant "had no authority to make or give said note," until it is shown that he was cognizant thereof, and neglected to notify plaintiffs of the true state of the case; for the defendant could not be taken to anticipate that Johnson & Co. would meet plaintiff's demand with a refusal to pay, and with a statement, which, though literally true, was false in spirit, suppressing, as it did, the truth, and suggesting a falsehood, viz., that they were not then liable. Plaintiffs, if deceived thereby, might be led ignorantly to sue defendant; but Johnson & Co. being liable on the note, plaintiffs would have no cause of action against defendant; and as to the cause of such suit, it would not have been commenced, if Johnson & Co. had paid their note, or not paying, had not given plaintiffs the false impression above mentioned. Johnson & Co., not defendant, are responsible for Johnson & Co's. falsehoods.

If, indeed, the ratification had not taken place when the note was present for payment, the defendant might be answerable for the costs of this suit, but in the absence of any evidence as to the time of ratification, this point does not arise.

Plaintiff must show error affirmatively. The instruction lays down a correct general rule. If the facts in this case were such that applied to them without qualification it would mislead the jury, it is for plaintiffs to show the existence of those facts.

It appears from the bill of exceptions that depositions of members of the firm of R. I. Johnson & Co. were read in evidence by defendant, and that certain interrogatories were objected to, either as leading, or calling for incompetent or irrelevant testimony, the objections overruled, and the answers received, to which plaintiffs excepted.

But the answers are not set out, and, therefore, we need not consider plaintiffs' objections to the interrogatories.

The answers may have been favorable to plaintiffs, or if irrevelant, it may be that it would have appeared upon the whole evidence, that they could not have materially injured the plaintiffs, and that the verdict was in all respects altogether according to justice.

Judgment affirmed.[1]

[1] *Accord:* Haight v. Sahler, 30 Barb. (N. Y.) 218; **Lingenfelder v. Leschen,** 134 Mo. 55.

After ratifying an unauthorized act the principal cannot maintain an action against the agent based upon the violation of authority. Halloway v. Arkansas Milling Co., 77 Kan. 76.

CHAPTER I

LIABILITY OF PUBLIC OFFICERS

Section 1.—Contracts

OGDEN v. RAYMOND

1853. Supreme Court of Errors of Connecticut.
22 Conn. 379

This was an action of assumpsit. The declaration contained two counts, one of which was general. The other alleged that, on or about the first day of April, 1850, the defendant was indebted to the plaintiff, in the sum of fifty dollars for labor and services before that time by the plaintiff done and rendered, in teaching school in a certain district in Round Ridge, county of Westchester and State of New York, at the special instance and request of the defendant. The cause was tried at Fairfield, before the [illegible] August term, 1852.

On the trial to the jury, the plaintiff introduced evidence and offered, in evidence, the statute laws of the state of New York relative to common schools, and the judicial decisions of said courts to prove the character in which the defendant contracted with the plaintiff. To the admission of this evidence the defendant objected, on the ground that it was not competent for him and impossible to prove, either count in the declaration, that he undertook, in his official character, to employ the plaintiff, or that the services, for which they were liable to be used as a consideration, and the law could be manufactured against them, were to be rendered exclusively; that the defendant was a public agent, and not liable to be sued personally, for services rendered to the district; and that if the defendant was liable at all he could only be sued as a trustee, in his official character.

The plaintiff claimed, that the evidence was admissible, to show that the defendant contracted with him in his individual capacity, and as his own responsibilities, and that he was personally liable, though he was contracting with him, by order of a district. And the

CHAPTER IX.

LIABILITY OF AGENT TO THIRD PARTY.

Section 1.—Contracts.

(a) AUTHORIZED CONTRACTS FOR DISCLOSED PRINCIPAL.

OGDEN v. RAYMOND.

1853. SUPREME COURT OF ERRORS OF CONNECTICUT.
22 Conn. 379.

THIS was an action of assumpsit. The declaration contained two counts, one of which was general. The other alleged, that, on or about the first day of April, 1850, the defendant was indebted to the plaintiff, in the sum of fifty dollars for labor and services before that time by the plaintiff done and rendered, in teaching school in a certain district in Pound Ridge, county of Westchester and State of New York, at the special instance and request of the defendant. The cause was tried at Fairfield, before the county court, August term, 1852.

On the trial to the jury, the plaintiff introduced witnesses, and offered, in evidence, the statute laws of the state of New York, relative to common schools, and the judicial decisions of said state, to prove the character in which the defendant contracted for the services of the plaintiff. To the admission of this evidence, the defendant objected, on the ground that it did not support and was not admissible to prove, either count in the declaration; that the evidence showed an employment, by the trustees of a school district, for which they were liable to be sued, as a corporation, and the action could be maintained against them, only in their corporate capacity; that the defendant was a public agent, and not liable to be sued personally, for services rendered to the district; and that if the defendant was liable at all, he could only be sued as a trustee, in his official character.

The plaintiff claimed, that the evidence was admissible, to show that the defendant contracted with him, in his individual capacity, and on his own responsibility; and, that he was personally liable, though, in so contracting with him, he acted as a trustee, and did

not so act as by law to give the plaintiff any remedy for his wages, against the other trustees, nor against any other person or persons. The defendant further claimed, that he made the contract with the plaintiff, as the trustee of such school district, and that in such capacity, and in making such contract, he was, by the laws and decisions of said state, a public agent, and could not be holden personally liable, unless, in making such contract, he was guilty of fraud or misrepresentation, or expressly contracted on his own personal responsibility; and asked the court to instruct the jury, that, if they should find that he was, by the laws of New York, such public agent, and made the contract in his official capacity, as trustee, and without fraud, misrepresentation, or express promise to be bound, or an intention to be bound, he was not personally liable, nor liable in this action.

The plaintiff denied that the defendant, as such trustee, and in making such contract, was a public agent, and claimed, that, unless the defendant so acted, as to give a remedy somewhere else, he was personally responsible, and liable in this action, and prayed the court so to instruct the jury.

The court charged the jury, in conformity with the claim of the plaintiff, that the plaintiff must have a claim somewhere—that a public agent is one who acts for the government, and not an individual or a private corporation, and that, in this case, the defendant could not be considered a public agent, in the strict sense of the law—and, if he had not so made the contract as the law requires, and so as that there could be a remedy over, he was personally liable.

The plaintiff having obtained a verdict, the defendant filed a bill of exceptions, and by motion in error, brought the case before the superior court, where it was reserved for the advice of this court.

Ellsworth, J.—The first question is the admissibility of evidence to prove the character in which the defendant contracted for the services of the plaintiff—whether individually or as a public officer. On this point we think the ruling of the court is not subject to objection. The evidence conduced to establish the point for which it was offered, and that was sufficient to make it admissible.

In the next place, the defendant claimed that he made the contract as a public agent, and therefore was not personally liable, unless, indeed, in making the contract he had been guilty of fraud or misrepresentation, or had superadded his personal engagement. The plaintiff, on the other hand, claimed that the defendant did not contract as a public agent, and furthermore, at all events must be liable unless he contracted in such a manner "as to give the plaintiff a remedy somewhere else." The court ruled in conformity to the claim of the plaintiff; and herein, we think, entertained an erroneous view of the law. The court held that, in point of law, the defendant was not a public agent, and could not be classed with public agents, who are presumed, while acting in public business,

to act in an official capacity. We do not readily apprehend why the defendant, deriving his public and official character from the general law and the election of the people of a given district, under the law, may not be held to be a public agent as much as if he were the agent of the state immediately, or of a county, town, society, or school district. Wherein is the difference? All derive their power from the same source, parceled out, only to be exercised in different jurisdictions and for different purposes. Such we understand to be the doctrine of our courts, as held in Adams v. Whittlesey, 3 Conn. R. 564; Perry v. Hyde, 10 Conn. R. 338; Sterling v. Peet, 14 Conn. R. 248; Johnson v. Smith, 21 Conn. R. 627. And the same is the law in New York: Olney v. Wickes, 18 Johns. 124. Often has it been held that select men and other kindred officers are public agents, officers of the law, though elected by their respective towns and districts.

We think, likewise, upon the second point made, that it does not follow that an agent, acting either in a public or private capacity, is of necessity made personally liable, although he does not give a cause of action against someone else. We believe the law to be, that if a person assumes to act and enter into contracts in the name of another as his principal, and does this with an honest intent, openly and fully disclosing all the facts touching his supposed authority, or which may be fairly implied from his situation, and especially if he provides against his personal liability, in any event he cannot be held liable unless he be guilty of fraud or false representation; and even then he is not necessarily liable on the contract itself. Story, in his treatise on agency, p. 322, says: "It seems clear that in no case can an agent be sued, on the very instrument itself, as the contracting party, unless there are apt words therein so to charge him; thus, if a person acting as agent for another should without authority, or exceeding his authority, make and execute a deed in the name of his principal, and not in his own name, the agent would not be liable thereon, although it would not bind the principal." The same was held in Douriman v. Jones, 9 Jur. 454; Polhill v. Walter, 3 Barn. & Adol. 114. The same doctrine was asserted in Massachusetts, in Long v. Coburn, 11 Mass. 97 (6 Am. Dec. 160); Ballou v. Talbot, 16 *id.* 461 (8 Am. Dec. 146); and the same in Pennsylvania, in Hopkins v. Mehaffy, 11 Serg. & R. 129. The cases in New York are somewhat different, but we think there is no question but that the rule laid down by Judge Story is the rule of our courts. We would especially refer to the cases to be found in 1 Am. Lead. Cas. 432, note to Elwell v. Shaw, and a later case, Lewis v. Nicholson, 12 Eng. L. & Eq. 433.

We are aware that it is not unfrequently laid down as a rule of law that if an agent does not bind his principal he binds himself; but this rule needs qualification, and cannot be said to be

universally true or correct, as the cases already cited abundantly show. If the form of the contract is such that the agent personally covenants, and then adds his representative character, which he does not in truth sustain, his covenant remains personal and in force, and binds him as an individual; but if the form of the contract is otherwise, and the language, when fairly interpreted, does not contain a personal undertaking or promise, he is not personally liable; for it is not his contract, and the law will not force it upon him. He may be liable, it is true, for tortious conduct if he has knowingly or carelessly assumed to bind another without authority; or, when making the contract, has concealed the true state of his authority, and falsely led others to repose in his authority; but, as we have said, he is not of course liable on the contract itself, or in any form of action whatever. The question in these cases will be found to be one of construction of the language and meaning of the person who attempts to act for another, and is a question often attended with very great difficulty and doubt; but when the intention is ascertained, that intention should ever be the rule for deciding whose contract it is. The cases are exceedingly conflicting, and unsatisfactory, though they contain some principles universally acquiesced in. If the agent is acting in public business, and enters into a contract for the benefit of the public, he is presumed to act in his official capacity, as in Hodgson v. Dexter, 1 Cranch 345; but if he is acting in private business, there is no presumption for or against, and he is or is not liable, according to the language used. The county court held that the defendant did not bind those for whom he apparently acted, and was therefore of necessity liable himself. This is not correct.

We have no occasion to comment on other facts of the case, although we think that in a subsequent part of the charge there is some obscurity in the language employed in instructing the jury; but we do not think it necessary to go into the question; for we mean to place our decision upon the errors already pointed out.

In this opinion the other judges concurred.

Judgment to be reversed.[1]

[1] *Accord:* Jones v. Gould, 108 N. Y. Supp. 31; Laguna Valley Co. v. Fitch, 121 Ill. App. 607. Compare Mayhew v. Prince, 11 Mass. 54.

"The legal presumption is, when a known agent deals or contracts within the scope of his authority, that credit is extended to the principal and not to the agent; and that the dealing is the act, or the contract is the engagement, of the principal alone, as if he were personally present and acting or contracting." Brickell, C. J., in Anderson v. Timberlake, 114 Ala. 377, 386.

1873 Contract to recover back money paid for the plaintiff on the indemnity for a promissory note which he had drawn for the accommodation upon which was formed.

Trial in the superior court, [illegible] county, [illegible] a verdict for the plaintiff, allowed the defendants bill of exceptions from which it appeared, that the defendants were note brokers and were known as such by the plaintiff; that they were employed as brokers for Hanson in selling the note, and that they paid [illegible] over those money, less a commission, before the forgery was discovered. The defendants testified that, during the negotiation which resulted in the plaintiff's purchase of the note, they informed him that they were selling the note as brokers for Hanson, who had employed them to sell it. There was also other testimony tending to show that the plaintiff knew or had reasonable cause to know these facts. The plaintiff denied any such information or knowledge, and offered evidence tending to show that there was no disclosure of the principal, and nothing to lead him to suppose that the defendants were not themselves the owners of the note.

The defendants asked the court to rule that if the defendants were in fact agents for Hanson, and disclosed their agency to the plaintiff, or the plaintiff knew it, or had reasonable cause to know it, the defendants would not be liable. But the court refused so to rule, and ruled that the question was, upon whom did the plaintiff understand that he was buying the note—from the brokers or from Hanson; that, upon the undisputed facts, proof that the transaction was with the defendants and to relieve them from liability there must have occurred such a state of facts that the plaintiff understood, or ought to have understood, that he was dealing with Hanson.

Morton, J.—This is a case in which the plaintiff received evidence of the genuineness of the [illegible] note sold by the defendants to the plaintiff. The plaintiff [illegible] on the purchase of the note he dealt solely with the defendants, and knew their credit. The defendants claimed that they were acting as agents of Hanson in the transaction, and that such principal was disclosed to the plaintiff. Upon these points the evidence was conflicting. The defendants asked the court to rule "that if the defendants were in fact agents for Hanson, and disclosed their agency to the plaintiff, or the plaintiff knew it, or had reasonable cause to know it, the defendants would not be liable."

Considered as an abstract proposition of law this is too broad. It omits the necessary element that in the [illegible] transaction

WORTHINGTON v. COWLES and Another.

1873. Supreme Judicial Court of Massachusetts.
112 Mass. 30.

Contract to recover back money paid by the plaintiff to the defendants for a promissory note signed by one Hanson, the endorsement upon which was forged.

Trial in the superior court, before Lord, J., who, after a verdict for the plaintiff, allowed the defendants' bill of exceptions from which it appeared, that the defendants were note brokers, and were known as such by the plaintiff; that they were acting as brokers for Hanson in selling the note, and that they paid him the purchase money, less a commission, before the forgery was discovered. The defendants testified that, during the negotiations which resulted in the plaintiff's purchase of the note, they informed him that they were selling the note as brokers for Hanson, who had employed them to sell it. There was also other testimony tending to show that the plaintiff knew or had reasonable cause to know these facts. The plaintiff denied any such information or knowledge, and offered evidence tending to show that there was no disclosure of the principal, and nothing to lead him to suppose that the defendants were not themselves the owners of the note.

The defendants asked the court to rule that if the defendants were in fact agents for Hanson, and disclosed their agency to the plaintiff, or the plaintiff knew it, or had reasonable cause to know it, the defendants would not be liable. But the court refused so to rule; and ruled that the question was, from whom did the plaintiff understand that he was buying the note—from the brokers or from Hanson; that, upon the uncontroverted facts, *prima facie,* the transaction was with the defendants, and to relieve them from liability there must have occurred such a state of facts that the plaintiff understood, or ought to have understood as a man of reasonable intelligence, that he was dealing with Hanson.

Morton, J.—This is an action of contract upon the implied warranty of the genuineness of the signature to a note sold by the defendants to the plaintiff. The plaintiff claimed that in the purchase of the note he dealt solely with the defendants, and upon their credit. The defendants claimed that they were acting as agents of Hanson in the transaction, and that their principal was disclosed to the plaintiff. Upon these points, the evidence was conflicting. The defendants asked the court to rule "that if the defendants were in fact agents for Hanson, and disclosed their agency to the plaintiff, or the plaintiff knew it, or had reasonable cause to know it, the defendants would not be liable."

Considered as an abstract proposition of law, this is too broad. It omits the necessary element that, in the dealings or transaction

in question, they were acting as such agents. It may be true that the defendants were agents of Hanson, and known to be such by the plaintiff, and yet if, in the purchase of this note, it was understood by the parties that the plaintiff was dealing with and upon the credit of the defendants, they would be liable. An agent may deal so as to bind himself personally; it is always a question of the intention and understanding of the parties. The presiding judge properly refused to give the instructions in the form requested by the defendants. Instead thereof, he ruled in substance that the question was, from whom did the plaintiff understand that he was buying the note—from the broker or from Hanson? and that if such a state of facts occurred, that the plaintiff understood, or ought to have understood as a man of reasonable intelligence, that he was dealing with Hanson, the defendants would not be liable.

These instructions were correct, as applied to the facts of the case. The plaintiff dealt with the defendants. His evidence tended to show that he contracted with them as principals. To meet this *prima facie* case, the defendants undertook to show that in this transaction they were dealing as agents of a disclosed principal. Unless from their disclosures or other sources the plaintiff understood, or ought as a reasonable man to have understood, that he was dealing with Hanson, he had a right to assume that he was dealing with the defendants as principals. The instructions given were to this effect, and were as favorable to the defendants as the instructions requested, with the addition of the necessary qualification that the defendants were in this transaction dealing as the agent of Hanson. Wilder v. Cowles, 100 Mass. 487. Merriam v. Wolcott, 3 Allen, 258.

Exceptions overruled.[1]

MAURY v. RANGER.

1886. Supreme Court of Louisiana. 38 La. Ann. 485.

Poche, J.—Plaintiffs seek to hold defendants personally liable under a contract of affreightment which the latter had executed as agents.

[1] An agent, although acting within his authority for a disclosed principal, may enter into a personal undertaking, by which he will be bound. Fisher v. Haggerty, 36 Ill. 128; Shordan v. Kyler, 87 Ind. 38; Fredendall v. Taylor, 26 Wis. 286.

"An agent may expressly contract on his own credit and be bound, even though his principal be known. The declaration of intention and agreement in writing on the part of the agent to bind himself personally may be so explicit as to admit of no denial by parol. But usually where the principal is disclosed, the question is one of fact." Lumpkin, J., in Phinizy v. Bush, 129 Ga. 479, 492.

The principal defence is that the [illegible] throughout the transactions which form the basis of this controversy as agents of the owners of the vessel in whose name they issued the bills of lading, and that they are not personally [illegible] under the contract declared upon. The [illegible] the [illegible] a judgment in favor of plaintiffs for the full amount [illegible]

The pertinent facts in the record are as follows:

In July, 1882, the defendants received [illegible] bills of lading [illegible] for 2,709 bales of cotton, to be [illegible] on board of the steamer Gracia, then on her way [illegible] and consigned to Liverpool, England, at the rate of [illegible] a penny sterling per pound. [illegible] under the effect of the quarantine then established by the state authorities at the mouth of the Mississippi river, the vessel Gracia was not allowed to reach the port of New Orleans, whereupon several bills, with the knowledge and consent of plaintiff, shipped the cotton to Liverpool by the steamer Chancellor, owned by a different line of steamers.

The bill of lading issued by the latter steamer was in the ordinary course, but it called for freight at the rate of three-eighths of a penny, which was exacted upon the consignees at Liverpool before delivery of the cotton by the Chancellor. It also appears that on delivery some of the cotton was found damaged, for which the shipper was charged the sum of 178 pounds sterling.

The demands of plaintiffs are for the difference of freight charges on the cotton at the rate of 19/64 of a penny per pound, and the charges created at the increased rate of three-eighths of a penny, and for the amount paid by them on account of the damaged cotton, the whole amounting in our currency to $1,977.10.

Plaintiff's theory, which was adopted by our learned predecessor in the district court, under which they propose to make the consignees personally liable, presents two propositions of law:

1st. The agents of merchants residing in a [illegible] country, or in another state, are personally liable, whether they [illegible] themselves as agents or not in the contract. [illegible] it is presumed that the credit is given exclusively to those in the exercise of their employment, but the presumption may be rebutted by proof that the credit was given to them or to the principal.

2nd. Where an agent fails to disclose the name of his principal, he is found personally.

While our appreciation of the cases in this state would justify the conclusion that the defendants would be exempted from liability under the principle and [illegible] rule contained in [illegible] proposition, we prefer to rest our conclusions on other grounds, and to withhold our sanction of a principle which has received in some English courts, but which has long since been abandoned in more progressive and enlightened jurisprudence and [illegible] Scottish tribunals.

The principal defense is that the defendants acted throughout the transactions which form the basis of this suit merely as agents of the owners of the vessel in whose name they had signed the bills of lading, and that they are not personally liable to plaintiffs under the contract declared upon. They prosecute this appeal from a judgment in favor of plaintiffs for the full amount of their claim.

The pertinent facts in the record are as follows:

In July, 1883, the defendants executed bills of lading to plaintiffs for 2,709 bales of cotton, to be received on board of the steamer Gracia, then on her way to this city, and consigned to Liverpool, England, at the rate of 19-64 of a penny sterling per pound. That under the effect of the quarantine then established by the state authorities at the mouth of the Mississippi river, the vessel Gracia was not allowed to reach the port of New Orleans, whereupon defendants, with the knowledge and consent of plaintiffs, shipped the cotton to Liverpool by the steamer Chancellor, owned by a different line of steamers.

The bill of lading issued by the latter steamer was to the steamer Gracia, but it called for freight at the rate of three-eighths of a penny, which was executed from the consignees at Liverpool before delivery of the cotton by the Chancellor. It also appears that on delivery some of the cotton was found damaged, for which the shippers were charged the sum of 118 pounds sterling.

The demands of plaintiffs is for the difference of freight charges on the cotton at the rate of 19-64 of a penny per pound and the charges exacted at the increased rate of three-eighths of a penny, and for the amount paid by them on account of the damaged cotton, the whole amounting in our currency to $2,977.10.

Plaintiff's theory, which was adopted by our learned brother of the district court, under which they propose to make the defendants personally liable, presents two propositions of law:

1st. The agents of merchants residing in a foreign country, or in another state, are personally liable, whether they describe themselves as agents or not in the contract. In such cases it is presumed that the credit is given exclusively to them to the exoneration of their employers; but the presumption may be rebutted by proof that the credit was given to both, or to the principal only.

2nd. Where an agent fails to disclose the name of his principal, he is bound personally.

While our appreciation of the facts in this case would justify the conclusion that the defendants would be exonerated even under the stringent and narrow rule contained in plaintiffs' first proposition, we prefer to rest our conclusions on other grounds, and to withhold our sanction of a principle which once prevailed in some English courts, but which has long since been repudiated by more progressive and enlightened jurisprudence, not excluding English tribunals.

The rule was formulated by Judge Story in his work on agency, predicated on some adjudications in the jurisprudence of England, but he lived long enough to appreciate its harshness and its damaging effect on international commercial intercourse, which was subsequently encompassed in more liberal ties, and became in time immeasurably increased and facilitated by the application of steam to navigation on the seas, the invention of the electric telegraph, and the multiplicity of railroad communications. Hence we find him in the revision of his work yielding a cheerful compliance with modern adjudications on the subject-matter, by the following material modification of his views as originally enunciated: "And probably the better rule is that the agent of a foreign principal is not, as a question of law, personally liable on every contract made for his principal. It is rather a question of fact in each case, a question of intention, to be ascertained by the terms of the particular contract and the surrounding circumstances." Story on Agency (6th ed.), § 268.

In the next section, 268 "a," the learned author adds another very wise and very significant qualification to the rule in the following words: "This presumption of credit being given alone to the agent, and not to the foreign principal, applies with the most force to purchases made by an agent for a foreign principal; but when a written contract is made, and expressed to be with a foreign principal and not with the agent, the latter is not liable, although the contract be signed by him, for and on account of the foreign principal."

These principles are unqualifiedly sanctioned by respectable authority of other states of the Union; and in connection with the second proposition advanced by plaintiffs, they have been followed in several cases by our own court. Oelricks v. Ford, 33 How. 49; Lyon v. Williams, 5 Gray 457; Bray v. Ketell, 1 Allen (Mass.) 80; New Castle v. Red River R. Co., 1 R. 147; Zacharie v. Nash, 13 La. 20; Nott v. Papet, 15 La. 306; Thorne v. Tait, 8 Ann. 8, 14 Ann. 448; Parlange v. Faures; Spotts v. Cowan, 9 Ann. 520.

In our examination of this case we have been guided by the jurisprudence thus established, and we conclude that the case is clearly with the defendants.

In a contract of affreightment, such as the one disclosed in this record, we find an apt illustration of the wisdom of the rule that in determining the question of the presumption as to which of the parties credit is given, which is the vital issue in all such cases, courts must deal with the question of fact in each case, with the question of intention to be ascertained by the terms of the particular contract and the surrounding circumstances.

Now in this case the record shows that defendants were (like plaintiffs) commission merchants and factors and dealers in cotton; and that as an appendage to their main business they undertook the agency of a line of steamers known and designated as the

The rule was formulated by Judge Story [illegible] agency, [illegible] in some subdivisions of the profession in England. [illegible] long ground in [illegible] its [illegible] ing [illegible] which was subsequently encompassed [illegible] but became in time immeasurably increased [illegible] by the [illegible] of steam [illegible] navigation on the [illegible] of the [illegible] telegraph, and the multiplicity of [illegible] Hence we find him in the [illegible] a cheerful compliance with modern adjudications [illegible] by the following material [illegible] as originally enunciated: "And probably the [illegible] one agent of a foreign principal is not, as a [illegible] personally liable on every contract made for his [illegible] a question of fact in each case, a question to be [illegible] by the terms of the particular [illegible] circumstances." Story on Agency (6th ed.) § 418.

[illegible] the learned author add another reason [illegible] the rule is the following [illegible] result being given alone to the agent, [illegible] which applies with the most force to [illegible] a foreign principal; for when a [illegible] expressed to be with a foreign principal [illegible] he is not liable, although the [illegible] on account of the foreign principal." [illegible] readily sanctioned by respectable authority in this Union; and in connection with the [illegible] plaintiffs, they have been followed [illegible] Delricks v. Ford, 35 How. 49; Lyon v. [illegible] Gray v. Kelly, 1 Allen (Mass.) 80; New Castle v. [illegible] c. 147; Zacharie v. Nash, 13 La. 29; Smith v. [illegible] Thorpe v. Tait, 8 Ann. 8, 14 Ann. 448; Pulsinger v. [illegible] Cowan, 6 Ann. 320.

In our examination of [illegible] we have been guided by the jurisprudence that [illegible] and we conclude that the case is clearly with the defendants.

In a contract of [illegible] such as the one disclosed in this record, we find no [illegible] of the wisdom of the rule that in determining the question of the presumption as to which of the parties credit is given [illegible] is the vital issue in all such cases, courts must deal with [illegible] of fact in each case, with the question of intention to be [illegible] by the terms of the particular contract and the surrounding circumstances.

Now in this case the record shows that defendants were (like plaintiffs) commission merchants and factors and dealers in cotton; and that as an appendage to their main business they undertook the agency of a line of steamers known and designated as the

"Serra Line of Steamers," plying between Liverpool and this port.

The nature of their connection with the steamer Gracia, for whose account they entered into the contract under discussion, was made known to plaintiffs by the very freight brokers, Dobell & Bell, who negotiated the contract between them and the defendants, and was made manifest to them on the very face and in every line of the bills of lading which were executed by the defendants, formally accepted, and at once transferred by endorsement by the plaintiffs as a commercial security.

The heading of the bill contains the words: "Serra Line of Steamers," "Louis Ranger & Co., Agents, New Orleans;" every stipulation in the bill is made in the name and for the account of the steamer, her commander and owners, and the contract is signed by the defendants as agents.

When, later on, circumstances prevented the literal execution of the contract through the steamer contemplated by the parties, plaintiffs were at once notified of the circumstances, and of the intention of the defendants to make the shipment by another steamer, the Chancellor, of the "Harrison Line," and were requested to change their insurance accordingly; all of which was accepted without murmur or objection by plaintiffs. And the record further shows that through a "cable" to the managers of the line at Liverpool, the defendants also notified them of the unforeseen disability of the vessel to carry out their contract with plaintiffs, and that the consent of said managers was obtained to operate the change of shipment to the Chancellor.

When sued in this case, the defendants again reiterated in their answer a statement of their true character in the premises and of their real and legal connection with the contract, and they amplified their previous disclosure of their agency as well as the names of the managing owners of the line of steamers. They therein declared that they were the agents of the "Serra Line, J. T. Nickels & Co., of Liverpool, managing owners," and defendants' principals.

We must hold these acts as a substantial and sufficient compliance with the very rule invoked by plaintiffs themselves, and as affording ample legal and equitable grounds to exonerate the defendants from all personal liability in the premises.

We pretermit any expression as to the right of plaintiffs to enforce their claim against any other party to the contract, and under the views as herein expressed we eliminate all discussion of the merits of their claims against the steamer Gracia, or her owners.

The discussion will involve questions of great interest and of attractive study, but it would answer no useful purpose in face of the conclusion which we have reached.

It is therefore ordered, adjudged and decreed, that the judgment appealed from be annulled, avoided and reversed; and it is now ordered and decreed that plaintiffs' demand against defendants be

rejected, and that their action be dismissed at their costs in both courts.[1]

(b) UNAUTHORIZED CONTRACTS.

WHITE AND OTHERS v. SKINNER.

1816. SUPREME COURT OF NEW YORK. 13 Johns. 307.

THIS was an action of covenant. The declarations set forth an agreement under seal, dated the 25th of April, 1815, by which the plaintiffs covenanted to make and furnish, at the Granville cotton factory, a quantity of machinery, of a certain description, one-half of which was to be delivered in October, 1815, and the other half on or before the 1st of May 1816, and that the defendant, in and by the said agreement, covenanted to pay the plaintiffs for the said machinery 15,120 dollars, in various instalments; one of which, or 900 dollars, was to be paid on the 30th of May, another of 500 dollars on the 29th of June, and another of 500 dollars on the 29th of July, 1815; and breaches were assigned for the non-payment of these several instalments.

PLATT, J.—The law is well settled that one person cannot seal for another without express authority, and it is also settled that if a person execute a bond as attorney for another, without authority, such person so assuming to act is personally bound, as though he had covenanted in his own name simply: 7 T. R. 207; 3 Johns. Cas. 180; 2 Cai. 254; 5 East 148.

The case of Tippets v. Walker, 4 Mass. 595, is similar to the present in almost every feature. There a committee of a turnpike corporation covenanted in their own names, as a committee, to pay for making a road for the corporation, and the question was, whether they were personally liable. Parsons, C. J., in delivering the opinion of the court, says: "If any individuals who are agents for the corporation, or of any officers of it, will voluntarily stipulate with workmen for their payment, it is reasonable that they should be holden to their contract. A case of this kind is not like a contract made by an agent for the public, and in the character of an agent, although it may contain an engagement to pay in behalf of the government. For the faith and ability of the state in discharging all contracts made by its agents in behalf, cannot, in a court of law, be drawn in question." Testing the defendant's plea by these rules, I think it is

[1] *Accord:* Kaulback v. Churchill, 59 N. H. 296; Oelricks v. Ford, 64 U. S. 49. *Contra:* Rogers v. March, 33 Me. 106; Vawter v. Baker, 23 Ind. 63. In the latter case it was said by Davidson, J., that a principal domiciled in another state of the United States would not be regarded as a foreign principal under the rule laid down. Compare with Oelricks v. Ford, *supra.*

and the demurrer is well taken. The defendant represented himself and assumed to act as the agent of the directors of the manufacturing company. He is now sued on his private individual covenant, and to exonerate himself he was obliged to show that he had authority to seal for his co-directors.

The covenant is not to be regarded as a nullity. The plaintiff relies on this specialty security. It is not for them the case to show that the defendant improperly bound his principal, but it is for the defendant, not the plaintiff, to show and prove the authorities, by which the defendant covenanted for himself and them, or for the company. Without, we had even presumed it a case in which the defendant acted improperly, and he has no right to call on the plaintiffs to prove either the negative or affirmative. The case is therefore bad, because it contains no such averment upon which the plaintiffs might have taken issue. If the defendant was personally bound, he might by his plea to have shown that upon the covenant the plaintiffs had a right of action against some other person.

That the plaintiffs were stockholders or partners in the manufacturing company affords no ground to defeat their claim under this covenant. The plaintiffs are entitled to judgment on the demurrer. Judgment for the plaintiffs.

DUSENBURY v. ELLIS

1803. SUPREME COURT OF NEW YORK. 3 Johns. Cas. [illegible]

In error on certiorari from a justice's court. [illegible] ary, before a justice, on a promissory note, for [illegible] and 77 cts, given by Dusenbury to Ellis or order, [illegible] ment, in blank. The note was signed by the defendant alone, as follows: "For Peter Storm, agreed [illegible] I promise," etc. It was proved that the defendant was liable, having signed the [illegible] as produced his letter of attorney, which [illegible] nothing more than the power to collect debts and [illegible] authority to give notes, or bind the principal in that way. The [illegible] judgment for the plaintiff below.

[illegible] — They can be no evidence for the defendant, without having any authority to that purpose. [illegible] answer could not bind the principal, and the plaintiff [illegible] "An authority to collect debts," [illegible] no authority to give notes.

rejected, and that both parties be dismissed at their costs in both courts.[1]

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(810) [illegible] v. [illegible]

(810) Supreme Court of New York. 14 Johns. 307.

This was an action of covenant. The declaration set forth an agreement under seal, dated the 28th of April, 1815, by which the plaintiffs covenanted to erect and furnish, at the Granville cotton factory, a certain machinery, of a certain description, one-half of which was to be delivered by October, 1815, and the other half on or before the 1st of May, 1816, and that the defendant, in and by the said agreement covenanted to pay the plaintiffs for the said machinery $7,620 by certain instalments, one of which of 600 dollars, was to be paid on the 30th of May, another of 500 dollars on the 30th of June, another of 500 dollars on the 29th of July, [illegible] for the non-payment of these several instalments.

Pleas: 1. That it is settled that one person cannot seal for another without authority, and it is also settled that if a person executes an instrument as attorney for another without authority, he is personally bound, as though he had executed it in his own name simply. 7 T. R. 207; 3 Johns. Cas. 180; 4 Cranch, 8.

The case of [illegible] 4 Mass. 505, is similar to the present in all [illegible] There a committee of a turnpike corporation [illegible] a committee, to pay for making a road [illegible] question, and the question was, whether they were personally [illegible] Parsons, C. J., in delivering the opinion of the court, [illegible] who are agents for the corporation, or who will voluntarily stipulate with workmen for their payment, it is reasonable that they should be holden to their contract. [illegible] that is not like a contract made by an agent in the name and in the character of an agent, although it may create an obligation to pay in behalf of the government. For the birth and [illegible] of the right to hold forging all contracts made by its agents or [illegible] in a court of law, be drawn in question. Testing the [illegible] plea by these rules, I think it is

[1] [illegible] Kentucky Common [illegible] Cranch, 8. In the other case [illegible] Cranch, 8. In the other case [illegible] a contract executed by a public agent of the United States [illegible] as a foreign principal under the rule laid down in Commercial Bank of Penn. v. Union Bank of New York, 11 N. Y. 203.

bad, and the demurrer is well founded. The defendant represented himself and assumed to act as the agent of the directors of the manufacturing company. He is now sued in his private individual capacity; and to exonerate himself, he was bound to aver and prove that he had authority to seal for his co-directors.

The covenant is not to be regarded as a nullity. The plaintiff relied on this specialty security. If it does not bind the directors, for whom the defendant represented himself as agent, then it is personally obligatory on the defendant alone, and it is incumbent on the defendant, not on the plaintiffs, to aver and prove the authorization, if any, by which the defendant contracted for Raymond and Hitchcock, or for the company. Whether he had such authority is a fact for which the defendant alone is responsible, and he has no right to call on the plaintiffs to prove either the negative or affirmative. The plea is therefore bad, because it contains no such averment upon which the plaintiffs might have taken issue. If the defendant is not personally bound, he ought by his plea to have shown that upon this covenant the plaintiffs had a right of action against some other person.

That the plaintiffs were stockholders or partners in this manufacturing company affords no ground to defeat their claim under this covenant. The plaintiffs are entitled to judgment on the demurrer.

Judgment for the plaintiffs.

DUSENBURY v. ELLIS.

1802. Supreme Court of New York. 3 Johns. Cas. 70.

In error on *certiorari* from a justice's court. Ellis sued Dusenbury, before a justice, on a promissory note, for 19 dollars and 77 cents, given by Dusenbury to Levi Fish or order, and by him endorsed, in blank. The note was signed by the defendant below, in this manner: "For Peter Sharpe, Gabriel Dusenbury, attorney." The note was, otherwise, in the usual form, and began with the words "I promise," etc. It was contended that the defendant was not liable, having signed the note merely as attorney for Sharpe, and he produced his letter of attorney, which, however, appeared to be nothing more than the power to collect debts, and contained no authority to give notes, or bind the principal, in that way. The justice gave judgment for the plaintiff below.

Per Curiam.—There can be no question but that Dusenbury signed the note, without having any authority for that purpose. The letter of attorney could not bind the principal beyond the plain import of it. An authority to collect debts cannot, by any possible construction, be an authority to give notes.

The only question then is, whether Dusenbury was not personally responsible, as for his own note. On this point we are of opinion that, if a person, under pretense of authority from another, executes a note in his name, he is bound; and the name of the person for whom he assumed to act will be rejected as surplusage. The party who accepts of a note, under such mistake or imposition, ought to have the same remedy against the attorney who imposes on him as he would have had against the pretended principal, if he had been really bound.

Judgment of affirmance.[1]

TIMKEN v. TALLMADGE.

1891. Supreme Court of New Jersey. 54 N. J. L. 117.

Reed, J.—The only question of law which is discoverable in the record of the proceedings in the district court is this: Does an action lie against the defendant personally, assuming that the conditions enjoined in the paper were performed? That the paper was obtained without fraud, and that the conditions were executed, we must assume, in the face of the findings of the trial court.

But the prosecutor insists that the defendant below entered into the engagement as a public officer, and that no personal responsibility for the payment of the amount named rests upon him. If the engagement into which the defendant entered had been within the scope of his official authority, I think that this view would be sound.

There is a well-defined distinction between the contracts entered by private agents and those contracts made by public agents in respect to their personal responsibility.

Where a private agent does not attempt to bind his principal, and in terms imposes the obligation upon himself, the rule is he incurs by such act a personal liability, although he describes himself as agent. Dayton v. Warne, 43 N. J. Law 659. But this is not the rule where the obligation is the same, but the agent is acting within the scope of his authority as a public agent. Knight v. Clark, 48 N. J. Law 22, 2 Atl. 780; Woodbridge v. Hall, 47 N. J. Law 388, 1 Atl. 492.

A public agent, whenever the contract is within the limits of the officer's power and duty, is not personally bound, unless a contrary

[1] "The authority of these cases (White v. Skinner and Dusenbury v. Ellis, *inter alia*) has been somewhat shaken by the remarks of the judges who delivered opinions in the case of Walker v. The Bank of the State of New York (5 Seld. 582); and in England, as well as in several of the United States, the principle upon which they rest, if they are supposed to present the only ground of liability of the agent, has been substantially repudiated." Selden, J., in White v. Madison, 26 N. Y. 117, 123.

transaction. The presumption is that the agent acts in an official capacity, and that the engagement is assumed by the public only. Woodbridge v. Hall, supra.

The paper signed by the mayor does not rebut this presumption.

The service for which the money was to be paid was [illegible] ice. The fugitive was a municipal officer.

The promise was made by the defendant over his official signature as mayor. The money was to be paid at the mayor's office.

Therefore, if it had appeared that the mayor had, as a part of his official power and duty, the authority to bind the municipality or any of its departments by such a contract, no one could doubt from an inspection that the action would lie against the city alone.

It however conclusively appeared that no such authority or duty existed. In fact the mayor was without the least semblance of power to act for any public body in the matter.

Now, a rule applicable to private agents is that, if an agent contracts, although in the character of agent, with no responsible principal to whom resort may be had, the law presumes that he contracts upon his personal responsibility, and intends to bind himself, and so holds him, for to no other way could the contract become effective. Booth v. Wimberly, 30 N. J. Law 250-255; Dun. Valley Ag. 374.

Whether this doctrine applies to public agents has been denied by some courts and doubted by others, except when there existed some express warranty of authority or fraudulent conduct on the part of the agent. The cases are collected in Mr. Mechem's recent book on public officers, §§ 809-815.

It is useless to examine these cases, for the rule applicable to private agents is extended to public agents in the full vigor by the court in the case of Bay v. Cook, 31 N. J. Law 343.

In that case an overseer of the poor had directed a physician to attend a pauper. The charges were made against the overseer as such.

An action was brought against the overseer to recover [illegible] charged, to which action the physician was made a party, on the ground that the overseer was not authorized to bind the township.

Another action was then brought by the physician against the overseer personally, and a verdict was rendered for him.

Upon error it was urged that the overseer was acting as a public agent, and that the physician had recovered [illegible]. This was denied, but nevertheless this court held the overseer personally liable for the physician's bill. The court says: "If an agent, either public or private, exceeds his authority in making a contract, he is personally liable for its performance, for the law will execute

The only question then is whether Dunscomb was not personally responsible as for his own debt. On this point we are of opinion that if a person, under pretence of authority from another, executes a note in his name, he is bound; and the name of the person for whom he assumed to act will be rejected as surplusage. The party who accepts of a note under such mistake or imposition ought to have the same remedy against the attorney who imposes on him as he would have had against the pretended principal, if he had been really bound.

Judgment of [illegible]

[illegible] v. TALLMADGE.

[illegible] (New York) 31 N. J. L. 117.

[illegible] on of law which is discoverable in the [illegible] the district court of [illegible]. Does an action lie against [illegible] personally, assuming that the conditions [illegible] were performed? That the paper was obtained [illegible] that the conditions were executed, we [illegible] the findings of the trial court.

[illegible] that the defendant below entered into [illegible] ness, and that no personal responsibility [illegible] amount named rests upon him. If the [illegible] defendant entered had been within the [illegible] I think that this view would be sound.

There is a [illegible] distinction between the contracts entered by private agents [illegible] contracts made by public agents in respect to [illegible] responsibility.

Where a [illegible] attempt to bind his principal, and in terms imposes [illegible] upon himself, the rule is he incurs by such act a [illegible]. Although he describes himself as agent. Dawes v. [illegible] L. Law 559. But this is not the rule where the [illegible] is the same, but the agent is acting within the scope of his [illegible] public agent. Knight v. Clark, 48 N. J. Law 22; Allen [illegible] v. Hall 47 N. J. Law 388, 1 Atl. 468.

A public agent, [illegible] the contract is within the limits of the officer's power and [illegible] not personally bound, unless a contrary

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[illegible] opinion in this case. Dawes v. Skinner and Dunscomb v. Ellis, the latter also [illegible] by the reporter of the judges who delivered opinions in the [illegible] The Bank of the State of New York v. Seed, 4 Wend. 512, and in [illegible] in the circuit court of the United States, the principle upon which [illegible] the court appeared to ground their only ground of liability of the agent, has been [illegible] repudiated. Sedgw. J., in White v. Madison, 26 N. Y. 119, 121.

intention is plainly indicated by the terms and circumstances of the transaction. The presumption is that he is acting in his official capacity, and that the engagement is meant to be with the public only. Woodbridge v. Hall, *supra*.

The paper signed by the mayor does not rebut, but fortifies, this presumption.

The service for which the money was to be paid was a public service. The fugitive was a municipal officer.

The promise was made by the defendant over his official title as mayor. The money was to be paid at the mayor's office.

Therefore, if it had appeared that the mayor had, as a part of his official power and duty, the authority to bind the municipality or any of its departments by such a promise, no one would doubt for an instant that the action would lie against the city alone.

It, however, conclusively appeared that no such authority or duty existed. In fact the mayor was without the least semblance of power to act for any public body in the matter.

Now, a rule applicable to private agents is that, if an agent contracts, although in his character of agent, with no responsible principal to whom resort may be had, the law presumes that he contracts upon his personal responsibility, and intends to bind himself, and so holds him; for in no other way could the contract have any validity. Booth v. Wonderly, 36 N. J. Law 250-255; Dun. Paley Ag. 374.

Whether this doctrine applies to public agents has been denied by some courts and doubted by others, except when there existed some express warranty of authority or fraudulent conduct on the part of the agent. The cases are collected in Mr. Mechem's useful book on public officers, §§ 809-815.

It is useless to examine these cases, for the rule applicable to private agents is extended to public agents in its full vigor by this court in the case of Bay v. Cook, 22 N. J. Law 343.

In that case an overseer of the poor had directed a physician to attend a pauper. The charges were made against the overseer as such.

An action was brought against the township to which the pauper was chargeable, in which action the physician was non-suited on the ground that the overseer was not authorized to bind the township.

Another action was then brought by the physician against the overseer personally, and a verdict was returned against him.

Upon error it was urged that the overseer was acting as a public agent, and that the physician had recognized him as such. This was not denied, but nevertheless this court held the overseer personally liable for the physician's bill. The court remarked: "If an agent, either public or private, exceeds his authority in making a contract, he is personally liable for its performance, for the law will esteem

him as acting in his individual capacity, rather than suffer the contract to fall."

Upon the rule laid down in that case the judgment brought up is affirmed.[1]

NOYES ET AL. v. LORING.

1867. SUPREME JUDICIAL COURT OF MAINE. 55 Me. 408.

INDEBITATUS assumpsit on account annexed, as follows: "1865, Oct. 17. To advertising taxes, 2½ sq., 18 w. $14.37." The writ contained also a count for money had and received, and *quantum meruit* for services, etc.

At the trial at *nisi prius,* it appeared that one Perkins was duly elected treasurer and collector of Saco for the year 1865; that, at the annual meeting, the town voted an abatement to those who should voluntarily pay their taxes on or before certain specified days, and that notifications of this vote and of the time when the tax bills were committed to him, were duly posted up in post bills, by the treasurer, the expense of printing and posting which was paid by orders drawn upon the selectmen.

It also appeared that, in October, 1865, after the expiration of the time for the allowance of such abatements, Perkins appointed the defendant assistant collector; that the defendant was duly qualified, and he gave bond for the faithful discharge of his duties; whereupon the tax bills of the unpaid taxes, amounting to between $17,000 and $18,000, were committed to him. The defendant then prepared a notice of his appointment, with a request that all who had not paid their taxes would forthwith make payment thereof at his office; and requested the plaintiffs to print a certain number of copies thereof in the form of post bills, and to insert the same as an advertisement in the newspaper published by them in Saco till otherwise ordered, and to charge it to the town. And the plaintiffs did as requested.

In March or April following the plaintiffs presented a bill for printing done for the town, including the charges for the printing ordered by the defendant, to the selectmen of Saco; but they refused to allow the items ordered by the defendant, denying his authority to order the work done at the town's expense. Subsequently, however, they drew an order for the post bills, but refused to allow the charge for publishing the advertisement, although it was the usual price. The defendant also refused to pay the same.

It also appeared that, when the printing was ordered by the de-

[1] *Accord:* Andrews v. Tedford, 37 Ia. 314; Terwilliger v. Murphy, 104 Ind. 32.

[illegible] he did not intend to promise that he would pay the fine. It was charged to the jury. The presiding judge instructed the jury that the action was upon a contract. That to support an action a contract must be proved. That a contract consists of mutual promises; that two kinds of promises are considered in proof of contracts, one is a special promise and the other an implied promise. That the special promise is shown where the parties declare and specifically fix the terms and conditions of their contract. The implied promise is a promise implied [illegible] circumstances proved in a case where no special contract is proved. They consist of such acts and circumstances as come to [illegible] of those promises necessary to complete a contract.

That, where there is a special contract founded upon mutual promises, the law does not imply promises inconsistent with those. The special promise excludes the idea of an implied one. The parties have seen fit to make their own terms and agreements, the law leaves them upon those terms.

That in this case, the contract being an oral contract if any were made, it is a question for the jury to find what that contract was. That, if there was a special contract to go to the work and look to the town for pay, the parties, being legally competent to make a contract, could abide by the terms of it.

That, if there was a special contract in this case, the fact that the services rendered may have accrued to the benefit of the defendants does not relieve the parties from the legal effect of their special contract. They were competent to make it as they did, and must abide by it.

That, if the defendant represented himself as an agent of the town and undertook to contract for them, and did so contrary to the [illegible] as authorized, he might be liable to another form of action to the plaintiffs, but not in this action, for any damage [illegible] from to the plaintiffs.

The verdict was for the defendant, and the plaintiff excepted.

Wilson, J.—The remedy against one who [illegible] assumes himself as the agent of another, and by his [illegible] induces to make a contract binding upon [illegible] is [illegible] the case for deceit, and not an action of assumpsit upon the contract. Long v. Colvard, 11 Mass. 637; Watson v. Tripp, 11 Mass. 602; Jeffs v. Nash, 3 Cush. 571; Abbey v. Collins, 5 Cush. 141; Jeffs v. Wood, 10 Cush. 505; Sweat v. Berry, 10 Mass. 8; Wilson v. Donaldson, 13 Ad. & El. (N. S.) 544. The gist of the action in such case is not a failure to keep the contract, but a false representation. Why then should the plaintiff's party be allowed to bring an action of assumpsit? If one person assumes, undertakes to make a contract for another, he assumes it necessarily void. It is not the contract of the principal, for the pretended

bill or voting in his favor should expressly waive any other the contract to fall."

Upon the rule laid down in that case the [illegible] brought up a sufficient [illegible]

1867. Supreme Judicial Court at Saco. 55 Me. 408.

[illegible] account annexed, as follows: "1865, Oct. 17. To abatement taxes, 25, 89, 18 & 514.35." The writ [illegible] for [illegible] and attached, and *quantum meruit* for services.

At the trial it appeared that one Perkins was duly elected [illegible] and collector of taxes for the year 1865; that, at the annual meeting, the town voted an abatement to those who should pay their taxes on or before certain specified [illegible] of this vote and of the time when the [illegible] limited to him, were duly posted up in past bills, [illegible] expenses of printing and posting which was [illegible] upon the selectmen.

[illegible] October, 1865, after the expiration of the [illegible] of such abatements, Perkins appointed the [illegible] collector, that the defendant was duly qualified, and [illegible] faithful discharge of his duties; wherenpon there [illegible] taxes amounting to between $17,000 and $18,000, were [illegible] to him. The defendant then prepared a notice of his [illegible] and a request that all who had not paid their taxes would [illegible] make payment thereof at his office, and requested the [illegible] to print a certain number of copies thereof in the [illegible] past bills, and to insert the same as an advertisement in the newspaper published by them in Saco till otherwise ordered, and [illegible] it to the town. And the plaintiffs did as requested.

In March or April following the plaintiffs presented a bill for printing done for the town, including the charges for the printing ordered by the defendant as the selectmen of Saco; but they refused to allow the items ordered by the defendant, denying his authority to charge the same to the town's expense. Subsequently, however, they drew an order for the past bills, but refused to allow the charge for preparing the advertisement, although it was the usual price. The defendant also refused to pay the same.

It also appeared that when the printing was ordered by the de-

[illegible] Andrews v. Inhabitants of [illegible] Tarbell v. Murphy, ante [illegible].

fendant, he did not intimate in anywise that he would pay therefor. It was charged to the town. The presiding judge instructed the jury that the action was upon a contract. That to support the action a contract must be proved. That a contract consists of mutual promises; that two kinds of promises are recognized in proof of contracts, one is a special promise and the other an implied promise. That the special promise is shown where the parties definitely and specifically fix the terms and conditions of their contract. The implied promise is a promise implied and arising from the acts and circumstances proved in a case where no special promise is proved. They consist of such acts and circumstances as raise in law an implication of those promises necessary to complete a contract.

That, where there is a special contract founded upon special promises, the law does not imply promises inconsistent with those. The special promise excludes the idea of an implied one. The parties having seen fit to make their own terms and engagements, the law leaves them upon those terms.

That, in this case, the contract being an oral contract, if any were made, it is a question for the jury to find what that contract was. That, if there was a special contract to do the work and look to the town for pay, the parties, being legally competent to make a contract, must abide by the terms of it.

That, if there was a special contract in this case, the fact that the services rendered may have operated to the benefit of the defendant does not relieve the parties from the legal effect of their special contract. They were competent to make it as they did, and must abide by it.

That, if the defendant represented himself as an agent of the town and authorized to contract for them, and did so contract, and was not so authorized, he might be liable in another form of action to the plaintiffs, but not in this action, for any damage resulting therefrom to the plaintiffs.

The verdict was for the defendant, and the plaintiffs alleged exceptions.

Walton, J.—The remedy against one who fraudulently represents himself as the agent of another, and in that capacity undertakes to make a contract binding upon his principal, is an action on the case for deceit, and not an action of assumpsit upon the contract. Long v. Coburn, 11 Mass. 97; Ballou v. Talbot, 16 Mass. 461; Jefts v. York, 4 Cush. 371; Abbey v. Chase, 6 Cush. 54; Jefts v. York, 10 Cush. 392; Smout v. Ibery, 10 Mees. & Welsb. 1; Jenkins v. Hutchinson, 13 Ad. & El. (N. S.) 744. The gist of the action in such cases is not a failure to keep and perform a promise, but a false representation. Why then should the injured party be allowed to bring an action of assumpsit? If one without authority undertakes to make a contract for another, the contract is necessarily void. It is not the contract of the principal, for the pretended

agent had no power to bind him. It is not the contract of the agent, for in making it he did not attempt to bind himself. How then can such a contract be the basis of a suit? Very clearly it cannot.

Nor should the injured party be allowed to waive the special contract, waive the tort, and recover upon an implied assumpsit, for such a form of declaring gives the defendant no notice of the real cause of complaint against him. Take, for instance, the declaration in this case. It contains nothing but general *indebitatus* assumpsit counts on an account annexed. Who, on reading such a writ, would ever suppose that the real ground of complaint against the defendant is that he undertook to make a contract for the town without authority?

It may not, indeed, seem unjust that the party who has undertaken to contract for another without authority should be held to perform the contract himself. In fact the law seems to have been so held in an early case in New York. (Dusenberry v. Ellis, 3 Johns. Cas. 70.) It was there held that one who without authority signed a promissory note as attorney for another was personally bound to pay it. But the inconsistency of such a doctrine, to use no stronger term, will be apparent by supposing that instead of a promise to pay money, the pretended agent had signed a promise that his principal should marry the plaintiff within a given time, or do some other act which it was perfectly competent for the principal to perform, but which the agent could not. What would be thought of a declaration charging the pretended agent as a principal in such a case?

It is undoubtedly true that if a person falsely represents that he possesses an authority which he does not possess, and another is injured by such misrepresentation, he is liable, but the remedy should be sought in a proper form of action. The plaintiff should not be allowed to allege neglect to keep and perform a promise, and then recover for a false and fraudulent allegation of authority.

But the plaintiffs claim that, inasmuch as the labor which they performed was beneficial to the defendant, he ought to pay for it; and that they may waive the tort, if any, which the defendant committed, and recover the value of their services in an action of assumpsit. No case has been cited in which such a course has been allowed; and, in Jones v. Hoar, 5 Pick. 285, the court says that the doctrine, that the injured party may waive the tort and bring assumpsit, is allowed only to this extent, that one whose goods have been taken from him or detained unlawfully, whereby he has a right to an action of trespass or trover, may, if the wrongdoer sell the goods and receive the money, waive the tort, affirm the sale, and have an action for money had and received for the proceeds.

So, if one acting as the agent of another without authority receives money, and has not paid it over to the principal, it may be re-

cannot have an action for money had and received. Jeffs v. York, 10 Clark, 392.

But it is only in favor of the person for whose use the money was received, which has been likened to the case of a bill in equity, that the rule is relaxed that the evidence must correspond with the allegations and be confined to the matter in issue, and this reasonable rule, which a party is allowed to avail himself of by demur and motion for a trial, being a departure from principle and the common rules of pleading, cannot be extended to new cases.

Our conclusion therefore is that the ruling of the presiding judge, to which exception is specially taken, namely, 'that if the defendant represented himself as agent of the town authorities to contract for them and did so contract and was not so authorized, he might be liable in another form of action, but not in this,' was correct.

The other rulings of the presiding judge reported in the bill of exceptions seem to require no further notice than to say that they are in accordance with well-settled principles of elementary law, and, so far as we are able to judge from the brief report of the evidence contained in the bill of exceptions, were pertinent to the issue.

Exceptions overruled. Judgment on the verdict.

FREESE v. CRARY.

1868. Supreme Court of Indiana. 29 Ind. 279.

Extract.] —Freese sued Crary on the following agreement in writing, viz:

"By this agreement, Frank Freese has this day sold to Frank Crary his house and two lots in Crary's addition to Centreville, and received payment in the following property: [illegible] Bank, of one hundred and sixty-one dollars, with all the interest thereon. All the Kinsella property in Centreville, county, and state of Indiana. Deeds to be made [illegible]

(Signed) "F. B. Freese.

"Witness, F. Crary, [illegible]

Lafayette, June 2, 1866."

[illegible] Lewis v. Jacobus, 6 B. [illegible] Ind. [illegible] Ohio v. Ellis, 6 Ohio, 158; Ohio v. Ins. Co., 8 Ohio, [illegible]

[illegible] Ind. [illegible] Ind. 247.

covered back in an action for money had and received. Jefts v. York, 10 Cush. 392.

But it is only in favor of the action for money had and received, which has been likened in its spirit to a bill in equity, that the rule is relaxed that the evidence must correspond with the allegations, and be confined to the matter in issue, and this relaxation, by which a party is allowed to aver a promise and recover for a tort, being a departure from principle and the correct rules of pleading, ought not to be extended to new cases.

Our conclusion therefore is, that the ruling of the presiding judge, to which exception is specially taken, namely, "that, if the defendant represented himself as an agent of the town, authorized to contract for them, and did so contract, and was not so authorized, he might be liable in another form of action, but not in this," was correct.

The other rulings of the presiding judge, reported in the bill of exception, seems to require no further notice than to say that they are in accordance with well-settled principles of elementary law, and, so far as we are able to judge from the brief report of the evidence contained in the bill of exceptions, were pertinent to the issue.

Exceptions overruled. Judgment on the verdict.[1]

FREESE v. CRARY.

1868. Supreme Court of Indiana. 29 Ind. 524.

Elliott, J.—Freese sued Crary on the following instrument in writing, viz.:

"By this agreement, Frank Freese has this day sold to Frank Crary his house and two lots, in Orth's addition to Lafayette, and received payment in the following property, known as the Hamlin farm, of one hundred and sixty-one acres, with all improvements thereon. All the aforesaid property is in Tippecanoe county, in the state of Indiana. Deeds to be made out as soon as possible.

(Signed) "F. B. Freese,
"Mrs. P. Lowe, per G. F. Crary, Agent.

"Lafayette, June 9, 1866."

[1] *Accord:* Lewis v. Nicholson, L. R. 18 Q. B. 503; Duncan v. Niles, 32 Ill. 532; Cole v. O'Brien, 34 Neb. 68; Sheffield v. Ladue, 16 Minn. 346.

"When one who has no authority to act as another's agent, assumes so to act, and makes either a deed or simple contract, in the name of the other, he is not personally liable on the covenants in the deed, or on the promise in the simple contract, unless it contains apt words to bind him personally. * * * The only remedy against him, in this commonwealth, is an action on the case for falsely assuming authority to act as agent." Metcalf, J., in Abbey v. Chase, 6 Cush. (Mass.) 54, 56.

See Russell v. Koonce, 104 N. Car. 237.

The complaint is in two paragraphs. The first, after stating the substance of the agreement, alleges that on or about the 22d day of June, 1866, the plaintiff and his wife made, signed and acknowledged a deed of conveyance to said defendant for the house and two lots in Orth's addition to the city of Lafayette, named in said agreement, which the plaintiff then tendered to said defendant, and demanded from him a deed of said Hamlin farm, which he failed and refused to make, to the plaintiff's damage five thousand dollars.

The second paragraph alleges that on the 9th of June, 1866, the defendant falsely and fraudulently represented to the plaintiff that he was the agent of Mrs. Peter Lowe, and as such had full authority to trade, barter and sell the farm owned by her, known as the Hamlin farm, in said county of Tippecanoe; that the plaintiff, confiding in said representations and believing the same to be true, was induced thereby to enter into and execute the written agreement hereinbefore set out; that in accordance with the terms of said agreement the plaintiff made, signed, acknowledged and tendered to the defendant a deed for the two lots named in said agreement, and demanded of him a deed for said Hamlin farm, which the defendant did not and could not execute; that the defendant was not in fact the agent of Mrs. Lowe, and had no authority from her to trade, barter or sell said farm, which he well knew at the time of making said contract; that the farm was of the value of ten thousand dollars, and the lots of the value of only five thousand dollars, wherefore the plaintiff is damaged in the sum of five thousand dollars, for which he demands judgment.

A separate demurrer was sustained to each of said paragraphs, and judgment was rendered thereon for the defendant. To these rulings the plaintiff excepted, and appeals to this court.

The first paragraph of the complaint shows no cause of action against Crary, the defendant. The agreement upon which it is based is not signed by him as a party thereto, but by "Mrs. P. Lowe, per G. F. Crary, agent." Crary's authority to act in the matter as the agent of Mrs. Lowe is not questioned in that paragraph. And although it is stated in the body of the instrument that the plaintiff "Freese has this day sold to Frank Crary his two lots," etc., yet as the instrument is executed in the name of Mrs. Lowe, by Crary as her agent, it can only be regarded as a contract between the plaintiff and Mrs. Lowe, and that the lots were contracted to Crary for her, and as her agent. The deed for the lots, therefore, should have been made to Mrs. Lowe and not to Crary, and upon her failure to convey the Hamlin farm, she, if anyone, and not Crary, would be liable to an action.

The second paragraph presents a different question. It alleges that the defendant falsely and fraudulently represented that he was the duly authorized agent of Mrs. Lowe to make the contract referred to, and thereby induced the plaintiff to enter into it, when in

truth, as the defendant well knew, he was not the agent of Mrs. Lowe, and had no authority to contract in her name. The rule as to the liability of the agent, in such cases, is stated in Story on Agency, § 264, p. 261, to be, "that whenever a party undertakes to do any act, as the agent of another, if he does not possess any authority from the principal, or if he exceeds the authority delegated to him, he will be personally responsible therefor to the person with whom he is dealing for or on account of his principal."

Assuming, then, without discussing the question, that the facts alleged in the second paragraph are sufficient to make the defendant liable for any damages sustained by the plaintiff, by reason of the alleged false representations as to the agency, still the question is, does he show that he has been injured thereby, in any respect, for which he is legally entitled to recover damages? It is not shown that he paid any part of the consideration, or parted with anything, or that he is placed in any worse condition than he would have been if the false representations had not been made, or the contract entered into. True, it is alleged that the Hamlin farm is worth ten thousand dollars, while the lots that the plaintiff was to convey in exchange for it, are only of the value of $5,000, and judgment is claimed for the difference; but this claim is wholly inadmissible. There is no principle of law, or rule of damages applicable to such cases, to sustain it. The paragraph only shows the plaintiff entitled, at most, to nominal damages; but for such recovery, merely, the judgment will not be reversed. Tate v. Booe, 9 Ind. 13.

The judgment is affirmed, with costs.

KROEGER v. PITCAIRN.

1882. Supreme Court of Pennsylvania. 101 Pa. St. 311.

Case, by W. C. Kroeger against Albert Pitcairn, to recover the amount of the loss sustained by the plaintiff in consequence of certain acts and representations made by defendant.

On the trial, before Kirkpatrick, J., the following facts appeared: On April 4, 1874, The Birmingham Fire Insurance Company issued a policy of insurance to William C. Kroeger, the plaintiff, "on his stock of merchandise and fixtures contained in the two-story frame store-room and cellar and in frame addition attached, situated at Enon Coal Company's works, about two miles west of Enon, etc."

One of the printed conditions of the policy was in these words: "Or if the assured shall keep or have in any place or premises where this policy may apply, petroleum, naphtha, benzine, benzole, gasoline,

benzine varnish, or any product in whole or in part of either; or gunpowder, fireworks, nitro glycerine, phosphorus, saltpetre, nitra of soda, or keep, have, or use camphene, spirit gas, or any burning fluids or chemical oils, without written permission in this policy, then and in every such case this policy shall be void."

In December, 1874, the premises so insured were totally destroyed by an accidental fire. Due notice was given the insurance company and preliminary proofs furnished, but the company refused to pay. An action was then brought on the policy and a judgment recovered to the amount of twenty-one hundred dollars. That judgment this court reversed. It had appeared on the trial that a barrel of carbon oil had been kept on the premises, and this was held to be an avoidance of the policy: Birmingham Fire Ins. Co. v. Kroeger, 2 Norris 64.

Albert Pitcairn, the defendant, was the insurance company's agent who procured the issue of the policy. He solicited Kroeger to allow him to effect the insurance; went upon the premises, examined them, furnished the description of them, and had the policy underwritten, bringing it with his own hand to Kroeger, from whom he collected the premium. What took place at that time was thus testified to by Kroeger: "He procured the policy and brought it to me; I took the policy and read it over, and in reading it over I happened to come across the fine print and noticed about these articles that should be mentioned in the policy—such as petroleum, and product of petroleum, and gasoline, and other things, I don't know what they call them, all strange names to me, and I told him about petroleum; says I, "Albert, you know there is a little petroleum kept there for the supplies to the mines;" I had to have that there all the time, as well as company supplies. He said, "Yes, I know that." Says I, "It says here it should be mentioned in the policy," and he says, "That is never taken notice of, only where it is kept in large quantities, say several hundred barrels; in that case, where it is wholesale, it should be mentioned, but so long as it is not kept more than one barrel in the store at a time, it is considered as general merchandise and it is never taken notice of in any other way."

Cross-examination—"The outcome was as I say; I objected to the policy on account of the way it was in the fine print; it seemed to me it was not proper, and I spoke to Mr. Pitcairn about that and he said that the policy was proper, that the policies were all made out in that way; that carbon oil, as long as it was not kept more than one barrel in the store, was considered as general merchandise and not mentioned in the policy, but where it was kept in large quantity, a hundred barrels or so, then it must be so mentioned, and exception made of it."

It was conceded that Pitcairn, all through, acted as the agent of the insurance company. He had admitted that he had no authority from his principal to represent to Kroeger that the printed condi-

that as to persons who was not binding unless notice of was kept
alive.

Plaintiff requested the court to charge each of the jury received
from the evidence that the defendant made to the plaintiff the repre-
sentations testified to by the witnesses and that the latter took into
account the faith thereof; and that the defendant had an authority
from the Birmingham Fire Insurance Company to make such rep-
resentations; that the premises insured were subsequently destroyed
by fire, and that because of the terms of the policy in suit relative to
premium the plaintiff failed in a recovery against said company
because of having a barrel of varnish on the premises, then he is
entitled to recover against the defendant in this action the amount
of the policy, with interest, from date of payment premium on said
policy.

Refused *pro forma*.

Defendant then presented the following points:

1st. To sustain this action the alleged misrepresentations must
not only have been false, but it must be shown that defendant knew
them to be false, and made them with intent to defraud the plaintiff.

Refused *pro forma*.

2nd. That the alleged representation was the mere opinion of
defendant as to the legal effect of the condition in the policy of in-
surance, and the condition of the policy being open to the observation
of the plaintiff, plaintiff was bound to know the legal effect thereof,
and cannot, for such opinion of defendant, recover in this action.

Refused *pro forma*.

3rd. That if, when defendant as agent of the Birmingham Fire
Insurance Company, delivered the policy to the plaintiff he made the
alleged representation as to the keeping of carbon oil on the insured
premises, and made them in accordance with the existing custom
of that and other insurance companies in insuring [illegible] condi-
tions in country stores, then plaintiff cannot recover.

Refused *pro forma*.

The court instructed the jury as to the several matters
[illegible] points presented as above. Verdict accordingly. Subsequently
the court entered judgment for the defendant on the points reserved
non obstante veredicto. Thereupon the plaintiff took the case up
on writ of error to the action of the court in entering judgment for
the defendant *non obstante veredicto*.

Assignment of Error.—The subject of complaint in this assignment of
error, is the entry of judgment for defendant *non obstante veredicto*.
It is contended that upon the facts [illegible] by the record,
judgment should have been entered thereon in favor of plaintiff.
The jury were instructed to return a verdict for the amount claimed
by him, if they [illegible] the allegations of the statement in
the policy presented by him were true. In order that the finding
in his favor necessary to support a verdict, it was essential that

benzine, naphtha, or any product in whole or in part of either, or gunpowder, fireworks, [illegible] glycerine, [illegible] benzoate, nitro or soda, or kept [illegible] camphene, and [illegible] any burning fluid or chemical oils [illegible] written [illegible] this policy, then and in every [illegible] this policy [illegible] void."

In December, 18[illegible] the premises insured were totally destroyed by an [illegible]. Due [illegible] was given the insurance company and proofs [illegible], but the company refused to pay. An action [illegible] brought on the policy and a judgment recovered [illegible] twenty-[illegible] dollars. That judgment [illegible] It had appeared on the trial that a barrel of carbon oil [illegible] on the premises, and this was held to be [illegible] Birmingham Fire Ins. Co. v. Kreeger, 2 [illegible].

[illegible] broadcast was the insurance company [illegible] one of the [illegible]. He solicited Kreeger to [illegible] outhouse, and [illegible] the premises, examined [illegible] portion of them, and had the policy under [illegible] his own hand to Kreeger, from whom he [illegible] This took place at that time was this: [illegible] procured the policy and brought it to me, [illegible] read it over, and in reading it over I happened [illegible] point and noticed about these articles that [illegible] the policy—such as petroleum, and products [illegible], and other things. I don't know what [illegible] means to me, and I told him about petroleum: [illegible] you know there is a little petroleum kept there for the [illegible] purposes.' I had to have that there all the time as we [illegible] supplies. He said, 'Yes, I know that. Says I, 'It [illegible] should be mentioned in the policy,' and he says, 'That [illegible] notice of only where it is kept in large quantities, say [illegible] barrels; in that case, where it is wholesale or [illegible] business, but so long as it is not kept more than one barrel [illegible] at a time, it is considered as general merchandise and [illegible] taken notice of in any other way."

[illegible] the contract was as I say. I objected to the policy on account [illegible] fine print; it seemed to me it was too [illegible] and I [illegible] Fitzsimmons about this and he said that the [illegible] that the policies were all made out in that way, and [illegible] so long as it was not kept more than one barrel in the store, was considered as general merchandise and not [illegible] where it was kept in large quantity it [illegible] that it must be so mentioned, and excepting made it void."

It [illegible] covered [illegible] Fitzsimmons acted as the agent of the insurance company. He [illegible] that he had no authority from his principal to [illegible] Kreeger that the printed condi-

tion as to petroleum was not binding, except where oil was kept wholesale.

Plaintiff requested the court to charge that if the jury believed from the evidence that the defendant made to the plaintiff the representations testified to by the latter and that the latter took said policy upon the faith thereof; and that the defendant had no authority from the Birmingham Fire Insurance Company to make such representations; that the premises insured were subsequently destroyed by fire, and that because of the terms of the policy in suit relating to petroleum, the plaintiff failed in a recovery against said company, because of having a barrel of carbon oil on the premises, then, he is entitled to recover against the defendant in this action the amount of the policy, with interest, from time of payment provided in said policy.

Affirmed *pro forma.*

Defendant then presented the following points:

1st. To sustain this action, the alleged misrepresentations must not only have been false, but it must be shown that defendant knew them to be false, and made them with intent to defraud the plaintiff.

Refused *pro forma.*

2nd. That the alleged representation was the mere opinion of defendant as to the legal effect of the condition in the policy of insurance, and the condition of the policy being open to the observation of the plaintiff, plaintiff was bound to know the legal effect thereof, and cannot, for such opinion of defendant, recover in this action.

Refused *pro forma.*

3rd. That if, when defendant, as agent of the Birmingham Insurance Company, delivered the policy to the plaintiff, he made the alleged representation as to the keeping of carbon oil in the insured premises, and made them in accordance with the existing custom of that and other insurance companies in insuring stocks of merchandise in country stores, then plaintiff cannot recover.

Refused *pro forma.*

The court instructed the jury to find for the plaintiff reserving the points presented as above. Verdict accordingly. Subsequently the court entered judgment for the defendant on the points reserved *non obstante veredicto.* Thereupon the plaintiff took this writ, assigning for error the action of the court in entering judgment for the defendant *non obstante veredicto.*

STERRET, J.—The subject of complaint, in both specifications of error, is the entry of judgment for defendant *non obstante veredicto.* It is contended that upon the facts established by the verdict, judgment should have been entered thereon in favor of plaintiff. The jury were instructed to return a verdict for the amount claimed by him, if they were satisfied the allegations of fact contained in the point presented by him were true. In view of this, the finding in his favor necessarily implies a verification of the several mat-

ters specified in plaintiff's point, and hence it must now be regarded as containing a truthful recital of the circumstances connected with the delivery of the policy and payment of the premium.

The transaction, as therein detailed, clearly amounted to a mutual understanding or agreement between the parties that the stock of merchandise, mentioned in the policy, should include one barrel of carbon oil; in other words, that the plaintiff should have the privilege of keeping that quantity of oil in connection with and as a part of the stock insured, without thereby invalidating his policy. It is impossible to regard the transaction in any other light. The jury found that plaintiff "took the policy upon the faith" of the representations made by defendant. These representations were not merely expressions of opinion as to the meaning of the policy. On the contrary, the defendant, acting as its agent and assuming authority to speak for the insurance company, asserted without any qualification that when carbon oil was kept as plaintiff was in the habit of keeping it—a single barrel at a time—it was unnecessary to mention the fact in the policy, or otherwise obtain the consent of the company; that no notice is ever taken of it unless "it is kept in large quantity—say several hundred barrels. In that case, when it is wholesale, it should be mentioned; but, as long as it is kept, not more than a barrel in the store at a time, it is considered as general merchandise and is not taken notice of in any other way." Such was the language employed by the defendant, evidently for the purpose of dispelling any doubt that existed in the mind of the plaintiff and inducing him to accept the policy and pay the premium; and, to that end at least, it was successful. What was said and done by defendant, in the course of the transaction, amounted to more than a positive assurance that the accepted meaning of the policy was as represented by him. In effect, if not in substance, his declarations were tantamount to a proposition, on behalf of the company he assumed to represent, that if the insurance was effected it should be with the understanding that a barrel of carbon oil was included in and formed part of the insured stock of merchandise, without being specially mentioned in the policy. The plaintiff doubtless so regarded his declarations, and relying thereon, as the jury has found, accepted the policy on the terms proposed, and thus concluded, as he believed, a valid contract of insurance, authorizing him to keep in stock, as he had therefore done, a small quantity of carbon oil. It was not until after the property was destroyed that he was undeceived. He then discovered that, in consequence of defendant having exceeded his authority, he was without remedy against the company. Has he any remedy against the defendant, by whose unauthorized act he was placed in this false position? We think he has. If the president or any one duly authorized to represent the company had acted as defendant did, there could be no doubt as to its liability. Why should not the defendant be person-

ally responsible, in like manner, for the consequences, if he, assuming to act for the company, overstepped the boundary of his authority and thereby misled the plaintiff to his injury, whether intentionally or not? The only difference is that in the latter the authority is self-assumed while in the former it is actual; but, that cannot be urged as a sufficient reason why plaintiff, who is blameless in both cases, should bear the loss in one and not the other. As a general rule, "whenever a party undertakes to do any act as the agent of another, if he does not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will be personally liable to the person with whom he is dealing for or on account of his principal:" Story on Agency 264. The same principle is recognized in Evans on Agency *301; Whart. on Agency 524; 2 Smith's Lead. Cases 380, note; 1 Pars. on Cont. 67, and in numerous adjudicated cases, among which are: Hampton v. Speckenagel, 9 S. & R. 212, 222; Layng v. Stewart, 1 W. & S. 222, 226; McConn v. Lady, 10 W. N. C. 493; Jefts v. York, 10 Cush. 392; Baltzen v. Nicolay, 53 N. Y. 467. In the latter case, it is said, the reason why an agent is liable in damages to the person with whom he contracts, when he exceeds his authority, is that the party dealing with him is deprived of any remedy upon the contract against the principal. The contract, though in form that of the principal, is not his in fact, and it is but just that the loss, occasioned by there being no valid contract with him, should be borne by the agent who contracted for him without authority. In Layng v. Stewart, *supra*, Mr. Justice Huston says: "It is not worth while to be learned on very plain matters. The cases cited show that if an agent goes beyond his authority and employs a person, his principal is not bound, and in such case the agent is bound." The plaintiff in error, in McCann v. Lady, supra, made a contract, believing he had authority to do so, and not intending to bind himself personally. The jury found he had no authority to make the contract as agent, and this court, in affirming the judgment, said: "It was a question of fact submitted to the jury, whether the plaintiff in error had authority from the School Board to make the contract as their agent. They found he had not. He was personally liable whether he made the contract in his own name or in the name of his alleged principal. It is a mistake to suppose that the only remedy was an action against him for the wrong. The party can elect to treat the agent as a principal in the contract."

The cases in which agents have been adjudged liable personally have sometimes been classified as follows, viz., 1st. Where the agent makes a false representation of his authority with intent to deceive. 2nd. Where, with knowledge of his want of authority, but without intending any fraud, he assumes to act as though he were fully authorized; and, 3d, where he undertakes to act, *bona fide* believing he has authority, but in fact has none, as in the case

of an agent acting under a forged power of attorney. As to cases fairly brought within either of the first two classes there cannot be any doubt as to the personal liability of the self-constituted agent; and his liability may be enforced either by an action on the case for deceit, or by electing to treat him as principal. While the liability of agents, in cases belonging to the third class, has sometimes been doubted, the weight of authority appears to be that they are also liable. In Story on Agency, the learned author, recognizing the undoubted liability of those belonging to the first two classes, says, "Another case may be put which may seem to admit of some doubt, and that is where the party undertakes to act as an agent for the principal, *bona fide* believing he has due authority, and therefore acts under an innocent mistake. In this last case, however, the agent is held by law to be equally as responsible as he is in the two former cases, although he is guilty of no intentional fraud or moral turpitude. This whole doctrine proceeds upon a plain principle of justice; for every person, so acting for another, by a natural if not a necessary implication holds himself out as having competent authority to do the act; and he thereby draws the other party into a reciprocal engagement. If he has no such authority and acts *bona fide,* still he does a wrong to the other party; and if that wrong produces injury to the latter, owing to his confidence in the truth of an express or an implied assertion of authority by the agent, it is perfectly just that he who makes such assertion should be personally responsible for the consequences, rather than that the injury should be borne by the other party who has been misled by it:" "Story on Agency, 264. This principle is sustained by the authorities there cited, among which is Smout v. Ilbery, 10 Mees. & Wels. 1, 9.

Without pursuing the subject further, we are of opinion that, upon the facts established by the verdict, judgment should have been entered for the plaintiff, on the question of law reserved.[1]

[1] "If there are not apt words to charge the agent, and the credit is not given to him, then he is liable only in an action *ex delicto.*" Downer, J., in McCurdy v. Rogers, 21 Wis. 199, 204.

The fact that the agent acquires no personal benefit from the wrong committed does not affect his liability. Weber v. Weber, 47 Mich. 569.

"When he (the agent) is guilty of no wrong or omission; when there is a full and honest disclosure of the nature and extent of his authority; when the party dealing with him has all the knowledge and information which the agent possesses, there is no liability resting upon him, though his act or contract proves to be *ultra vires.*" Brickell, C. J., in Ware v. Morgan, 67 Ala. 461, 468.

COLLEN v. WRIGHT.

1857. EXCHEQUER CHAMBER. 8 E. & B. 647.

Appeal from the decision of the Court of Queen's Bench in a case stated without pleadings. The case will be found stated in full in the report below: Collen v. Wright, 7 E. & B. 301. In substance it stated that the action Wright the husband of a gentleman named Gardiner, and in such name made an agreement with the plaintiff for the lease to him of certain premises at a fixed rent and covenants. A formal agreement between plaintiff and husband was drawn up and signed by the latter in the following form: "I, William Wright, agree to William Otho Gardiner, Esquire, [illegible]." It was also signed by plaintiff. The plaintiff entered on the premises in pursuance of the agreement. Mr. Gardiner refused to execute any such lease, alleging, accurately as it proved, that he had contracted on the faulty authority of a letter for a lease for a long term of years. The plaintiff had commenced a suit in chancery against Gardiner for specific performance. On discovering the ground of objection his solicitor sent to Wright a formal notice that unless they received from Wright notice to the contrary, the plaintiff would proceed with suit in Wright's interest; and, in the event of his bill being dismissed on the ground of the absence of authority, would commence an action to recover the costs and other damages by reason of Wright's want of authority. Wright's solicitor sent an answer, dated 27th April, 1855, denying Wright's liability in any action but not disputing any statement that Wright had not his full authority. The suit was proceeded with and the bill dismissed with costs on the ground that Wright had no authority from Gardiner to make the agreement. The case in the Queen's Bench was upon Wright's death and substituted the executors in his place. It was therefore the plaintiff's intention to maintain an action against the defendants as executors and trustees of the property entrusted to them [illegible] damages [illegible] Wright [illegible] executors for the plaintiff, to indemnify them [illegible] costs and damages [illegible] costs and damages [illegible] suit [illegible] recovered, whether or not there was any [illegible] against, however, on the exact matter [illegible] for [illegible] [illegible] [illegible]

COLLEN v. WRIGHT.

1857. Exchequer Chamber. 8 E. & B. 647.

Appeal from the decision of the Court of Queen's Bench on a case stated without pleadings. The case will be found stated in full in the report below: Collen v. Wright, 7 E. & B. 301. In substance, it stated that the testator Wright was land agent for a gentleman named Gardner, and, as such, made an agreement with the plaintiff for the lease to him for 12½ years of a farm of Gardner's. A formal agreement between landlord and lessee was drawn up and signed by the testator in the following form: "Robert Wright, agent to William Dunn Gardner, Esquire, lessor." It was also signed by plaintiff. The plaintiff entered on the farm on the strength of this agreement. Mr. Gardner refused to execute any such lease, alleging, accurately as it proved, that he had conferred on the testator no authority to agree for a lease for so long a term. The plaintiff had commenced a suit in chancery against Gardner for a specific performance. On discovering the ground of defense, his solicitor sent to Wright a formal notice that, unless they received from Wright notice to the contrary, the plaintiff would proceed with suit at Wright's expense; and, in the event of his bill being dismissed on the ground of the absence of authority, would commence an action to recover the costs and other damages by reason of Wright's want of authority. Wright's solicitor sent an answer, dated 11th April, 1855, denying Wright's liability to any action, but not containing any admission that Wright had not had full authority. The suit was proceeded with, and the bill dismissed with costs, on the ground that Wright had no authority from Gardner to sign the agreement. The case in the Queen's Bench was stated after Wright's death, and submitted two questions to the court: 1. Whether the plaintiff is entitled to maintain an action against the defendants, as executrix and executors of the said Robert Wright to recover damages; 2. Whether, if so, the whole of the damages sustained by the plaintiff, including his costs of the said suit in chancery, can be recovered; or, if some of such damages and costs only can be recovered, which of them, and to what extent, without regard, however, to the exact amount. The case contained provisions for a judgment, subject to an arbitration to ascertain the amount of damages according to the principles laid down by the court. The court of Queen's Bench ordered that judgment should be "entered for the plaintiff for such amount of damages as shall include money laid out and costs of chancery suit."

The defendant appealed.

Willes, J.—It appears to me that the judgment of the Court of Queen's Bench ought in all respects to be affirmed. I am of opinion that a person, who induces another to contract with him as the agent

of a third party by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue. This is not the case of a bare misstatement by a person not bound by any duty to give information. The fact that the professed agent honestly thinks that he has an authority affects the moral character of his act; but his moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person or alleviates the inconvenience and damage which he sustains. The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist.

The fact of entering into the transaction with the professed agent, as such, is good consideration for the promise. Indeed the contract would be binding upon the person dealing with the professed agent if the alleged principal were to ratify the act of the latter. This was, in effect, the view taken by the Court of Queen's Bench, and to which I adhere. With respect to the amount of damages, I retain the opinion thrown out in the course of the argument, that all the expenses sought to be recovered were occasioned by the assertion of authority made at the time of the contract being continued and persisted in by the defendant's testator and *bona fide* acted upon by the plaintiff. That assertion was never withdrawn, not even in the letter of April 11, 1855, in answer to the plaintiff's notice to the defendant's testator, long after the proceedings in chancery had commenced and whilst they were in full progress. I am therefore of opinion that the judgment of the Queen's Bench was right, and that it ought to be affirmed.

Cockburn, C. J.—I regret most unfeignedly to find myself differing in this case from so many of my learned brothers, for whose opinions I entertain the profoundest respect and deference, and in whose views I should have every disposition to acquiesce, if, after considering the subject with the most anxious desire to concur with them, I could persuade myself that in giving judgment for the plaintiff we were not going beyond what the law warrants. The proposition we are called upon to affirm is, that by the law of England a party making a contract as agent in the name of a principal impliedly contracts with the other contracting party that he has authority from the alleged principal to make the contract, and that, if it turns out that he has not this authority, he is liable in an action on such implied contract. It appears to me that there is not sufficient authority to warrant this position, and that, even assuming for the purpose of the argument that such a rule might be desirable, in establishing it we shall be creating a new law instead of expound-

ing that which already exists. I believe I am fully justified in saying that this doctrine is altogether a novel one. I have looked carefully into the various treatises and text books on the law of contracts; and, so far as I have been able to discover, although the doctrine of implied contracts has been fully discussed, and the instance of implied contracts as existing in the law of this country carefully enumerated, no mention is to be found of the implied contract contended for in this case. Nor is any trace of such an action to be found, so far as I am aware, in the printed books of precedents on the forms of actions and of pleading. And, what is still more remarkable, in the learned and elaborate works which treat of the law relating to agency, and in which the liabilities of agents, or persons professing to act as such toward third parties, are fully considered, not even a hint is to be found of any implied contract on the part of the agent as to the existence of the authority on which he professes to act. In Professor Story's work on Agency, while it is laid down as clear that a person contracting as agent without authority will be liable to the party with whom the contract is made, yet, when the mode in which that liability is to be enforced is considered, the alternative is put between a special action on the case on the one hand, and an action on the contract against the professed agent as principal on the other; but it does not appear to have occurred to that very learned and scientific jurist that, either by the law of England or that of America, an action could be maintained on an implied contract as to the existence of authority. In like manner, in the note to the case of Thompson v. Davenport, 9 B. & C. 78 (E. C. L. R. vol. 17), where the principles as to liability as collected from the cases on agency are laid down, it is asserted that if a man state himself to be an agent, but have really no principal, he is, in law, himself the principal; but it is not suggested that he is liable *ex contractu* in any other form than as principal on the original contract. Nor is this silence to be wondered at; for, on looking to the reported decisions of our own and of the American courts, it will be found that at the time these learned authors wrote no such doctrine had ever been broached, but the remedy against a party contracting on behalf of another without authority was assumed to be either by an action on the case for the false representation, or by an action against him as principal on the original contract. The doctrine that a person professing to act as agent without sufficient authority might be made responsible as principal was only subverted at a comparatively recent period. In Paley's work On the Law of Principal and Agent, Ch. 6, § 1, p. 386 (3d ed.), it is laid down, and supported by authorities, that a party contracting as agent is responsible as principal, where there is no responsible principal to resort to, or where he exceeds his authority so that the principal is not bound. Story we have seen holds the like language. In the case of Jones v. Downman, 4 Q. B. 235 (E. C. L.

R. vol. 45), which was an action *ex contractu,* the doctrine of Story, that, "wherever a party undertakes to do any act, as the agent of another, if he does not possess any authority from the principal, or if he exceeds the authority delegated to him, he will be personally responsible therefor to the person with whom he is dealing for or on account of his principal," was adopted by the Court of Queen's Bench, as "supported by numerous authorities," and "founded on plain justice." And the defendant, who was there sued as principal, was held to be liable on the contract. It is true that that case was afterwards reversed on error in the court of exchequer chamber, (b) but solely on the ground that the absence of authority was not shown; and the court, in other respects, appears to have recognized the propriety of the decision of the Court of Queen's Bench. And in a note to the case of Thomas v. Hewes, 2 C. & M. 519, 530, n.,* the same law is stated to have been laid down on different occasions by the late Mr. Baron Bayley, and by Lord Wensleydale when a baron of the exchequer; the case of Smout v. Ilbery, 10 M. & W. 1,[1] where an action was brought against a married woman for goods purchased by her on her husband's account after her authority to pledge his credit had been terminated by his death, of which fact she had been ignorant, though the court held that the action could not be maintained under the circumstances, it was never doubted that action was rightly brought in contract. The case of Polhill v. Walter, 3 B. & Ad. 114 (E. C. L. R. vol. 23), in which it was held that a person accepting a bill drawn upon another in the name of the drawee without authority could not be sued upon the bill as acceptor, seems first to have given rise to a contrary impression, although that case turned mainly on the peculiar character of the bill of exchange as incapable of being accepted by anyone but the drawee except for honor of the latter. But the more recent case of Jenkins v. Hutchinson, 13 Q. B. 744, (E. C. L. R. vol. 66), laid down the position broadly that an action *ex contractu* could not be maintained against the professed agent as principal; and the same doctrine was fully confirmed and acted upon in the succeeding case of Lewis v. Nicholson, 18 Q. B. 503 (E. C. L. R. vol. 83). In the meantime, the liability of a professed agent for the unwarranted assertion of authority in an action on the case underwent further consideration; and the doctrine of some writers, that any misrepresentation whereby another was induced to do, or omit to do, an act from which injury resulted, would render the party making it liable, underwent material modification, the modern decisions having established that such misrepresentation will not afford a ground of action where made in good faith and without knowledge that it was untrue. The effect of these doctrines being to leave a person who made a contract with another as agent without a remedy where the professed agent had acted under a mistaken im-

pression as to his authority, it occurred to the judges of the Court of Queen's Bench who decided, in the case of Lewis v. Nicholson, that an action would not lie against the agent as the principal, to suggest that, possibly, the agent might, under such circumstances, be held liable on an implied contract that he had authority to contract in the name of the principal. And the opinion thus incidentally thrown out in that case has been acted upon in this. It was of course impossible, so long as the doctrine prevailed that the professed agent could be sued as principal, that he could be held to be liable on this implied contract. It would have been obviously inconsistent to say that upon one and the same contract a man could at the same time be liable upon an express and also upon an implied promise. To my mind it by no means follows that, because that which was believed to be the remedy in law turns out upon further consideration not to be so, we are therefore justified in resorting to the fiction of an implied contract hitherto unknown to our law. To me it seems a very strong argument against the existence of any such implied contract that, frequently as the question of the absence or excess of authority in supposed agents has been before our courts, and as much as the question of liabilities of agents has been discussed, no trace of this doctrine is to be found in our law books until within the last few years. I do not think we are justified in introducing such a remedy by the mere fiat of a judicial decree. I do not stop to discuss the expediency or policy of the proposed rule. Otherwise I think it might be shown that there are two sides even to this part of the case. I doubt whether there is any sufficient ground why erroneous representation, in the absence of falsehood or fraud, should create a greater responsibility in the case of a contract than in the case of any other transaction, especially as the other contracting party might always protect himself by insisting on communicating with the alleged principal or by requiring a warranty of authority from the agent. But I by no means desire to rest my opinion upon this ground. My view is, that this implied contract, which we are called upon to establish in this case, is a thing unknown to our law; that we are dealing not with a mere mode whereby an acknowledged liability may be enforced, but, a supposed liability having turned out to be unfounded in law, we are now creating a new species of liability on a new contract, now for the first time to be implied, as to a warranty of authority which, if the party now to be charged had been required expressly to give, he would probably have refused. If it is desirable to establish such a rule, it seems to me it should be done by legislative enactment; and that to establish it by judicial decision is to make the law, which it is our only province to expound. Against this course, though in all humility and with the utmost deference to the

better opinion of my colleagues, I feel it my duty to record my protest.

Judgment affirmed.[1]

PATTERSON v. LIPPINCOTT.

1885. Supreme Court of New Jersey. 47 N. J. L. 457.

Scudder, J.—An action of debt was brought in the court for the trial of small causes by Jacob M. Patterson against Barclay Lippincott, to recover the balance, $75, claimed under a contract in writing for the sale of the exclusive right to use, manufacture and sell the plaintiff's patent "air-heating attachment," in Atlantic county, New Jersey. The writing was signed "Geo. P. Lippincott, per Barclay Lippincott," on the part of the purchaser. The state of demand avers that by virtue of this agreement the plaintiff did in due form convey said patent right to said George P. Lippincott, that said George and Barclay, on request, have refused to pay said balance, and that, since payment became due, the plaintiff has found out and charges that said George is under the age of twenty-one years. He further avers that he never had any contract or negotiations with George, and that Barclay's warranty of authority to act for his minor son is broken, whereby an action has accrued to the plaintiff against the defendant.

The averment that the plaintiff never had any contract or negotiations with George, is not sustained by the proof, for the testimony of Joseph N. Risley, the agent who made the sale, which is the only evidence on this point that appears in the case, is, that the defend-

[1] *Accord:* Trust Co. v. Floyd, 47 Ohio St. 525; Boston R. R. Co. v. Richardson, 135 Mass. 473; Cochran v. Baker, 34 Ore. 555.

In Oliver v. Bank of England, L. R. (1902) 1 Ch. D. 610, the doctrine of Collen v. Wright was applied to a case where an agent acted under a forged power of attorney, believing it to be genuine. Vaughan Williams, L. J., on page 626, quoted with approval the following statement from the opinion of Bramwell, L. J., in Dickson v. Reuter's Telegram Co., L. R. 3 C. P. D. 1, 5: "Collen v. Wright establishes a separate and independent rule, which, without using language rigorously accurate, may be thus stated: if a person requests and, by asserting that he is clothed with the necessary authority, induces another to enter into a negotiation with himself and a transaction with the person whose authority he represents that he has, in that case there is a contract by him that he has the authority of the person with whom he requests the other to enter into the transaction." See note to Oliver v. Bank of England, in 16 Harv. Law Rev. 311.

"The reason why the agent is liable in damages to the person with whom he contracts, when he exceeds his authority, is that the party dealing with him is deprived of any remedy upon the contract against the principal." Andrews, J., in Baltzen v. Nicolay, 53 N. Y. 467, 469.

Regarding the measure of damages when a recovery is had against the agent, see Dung v. Parker, 52 N. Y. 494.

ant told him he was going out of business and intended to transfer it to George; requested him to see George; he did so; talked with him; he looked at the patent; was satisfied with it, and talked with his father about buying it. The deed for the patent right in the Atlantic county was drawn to George P. Lippincott. It is proved by the admission of the defendant, Barclay Lippincott, that at the time of such sale and transfer his son George was a minor. This admission is competent testimony in this suit against him.

A verdict of a jury was given for the plaintiff against the defendant in the court for the trial of small causes; and on the trial of the appeal in the court of common pleas there was a judgment of nonsuit against the plaintiff. The reason for the nonsuit does not appear on the record, but the counsel have argued the cause before us on the case presented by the pleadings and proofs, the contention being here, as it was below, that the plaintiff could not aver and show the infancy of George P. Lippincott, and bring this action against Barclay Lippincott, as principal in the contract, in contradiction of its express terms.

On the face of the written agreement George P. Lippincott is the principal and Barclay Lippincott the agent. The suit on the contract should therefore be against the principal named, and not against the agent, unless there be some legal cause shown to change the responsibility. The cause assigned by the plaintiff is the infancy of George at the time the agreement was made in his name by his father. The authority on which he bases his right of action is Bay v. Cook, 2 Zab. 343, which follows and quotes Mott v. Hicks, 1 Cow. 536, to the effect that if a person undertakes to contract, as agent, for an individual or corporation, and contracts in a manner which is not legally binding upon his principal, he is personally responsible; and the agent, when sued on such contract, can exonerate himself from personal responsibility only by showing his authority to bind those for whom he has undertaken to act. Bay v. Cook, was an action against an overseer who had employed a physician to attend a sick pauper, without an order for relief under the provisions of the act concerning the poor. As his parol contract with the physician was entirely without authority to bind the township, it was said that he had only bound himself to pay for the services rendered at his request.

Later cases have held that an agent is not directly liable on an instrument he executes, without authority, in another's name; that the remedy in such case is not on the contract, but that he may be sued either for breach of warranty or for deceit, according to the facts of the case. Jenkins v. Hutchinson, 13 Q. B. 744; Lewis v. Nicholson, 18 Q. B. 503; Baltzer v. Nicolay, 53 N. Y. 467; White v. Madison, 26 N. Y. 117, and many other cases collected in the notes in Whart. on Agency, §§ 524, 532, and notes to Thomson v. Davenport, 9 B. & C. 78, in 2 Sm. Lead. Cas. *358. (Am. ed.)

Andrews, J., in Baltzer v. Nicolay, *supra,* says: "The ground and form of the agent's liability in such a case has been the subject of discussion and there are conflicting decisions upon the point; but the later and better-considered opinion seems to be, that his liability, when the contract is made in the name of his principal, rest upon an implied warranty of his authority to make it, and that the remedy is by an action for its breach."

Although the state of demand in the present case is uniformly drawn, there is in the last sentence a charge that the defendant's warranty of authority in pretending to act for said minor is broken, whereby an action has accrued. This alleged breach of an implied warranty is founded on the assumption that the son could not confer any authority, during his minority, to his father to act for him in the purchase of this patent right. There are two answers to this position. The act of an infant in making such contract as this, which may be for his benefit in transacting business, either directly or through the agency of another, is voidable only, and not absolutely void, and therefore there is no breach of the implied warranty unless there be proof showing that the act of the agent was entirely without the infant's knowledge or consent. The mere fact of the infancy of the principal will not constitute such breach.

It was argued in Whiting v. Dutch, 14 Mass. 457, that a promissory note signed by Dutch for his partner, Green, who was a minor, was void as to Green, because he was not capable of communicating authority to Dutch to contract for him, and that, being void, it was not the subject of a subsequent ratification. But the court held that it was voidable only, and having been ratified by the minor after he came of age, it was good against him. See Tyler on Inf., Ch. 111, §§ 14, 18.

Another answer is, that the defense of infancy to this contract with the plaintiff can only be set up by the infant himself, or those who legally represent him. Infancy is a personal privilege of which no one can take advantage but himself. Voorhees v. Wait, 3 Gr. 343; Tyler on Inf., ch. IV, § 19; Bingham on Inf. 49.

In this case the plaintiff seeks to disaffirm the infant's contract with him, in his own behalf, and sue a third party on the contract, whose authority to bind him the infant has not denied. The privilege of affirming or disaffirming the contract belongs to the infant alone, and the plaintiff cannot exercise it for him. The mere refusal to pay, charged in the demand and proved, is not a denial of the defendant's authority to bind the infant, for it may be based on the failure of consideration, the invalidity of the patent, fraudulent representations or other causes.

The judgment of nonsuit entered in the court of common pleas will be affirmed.[1]

[1] See Lewis v. Tilton, 64 Ia. 220.

Section 2.—Torts.

NEWPORT and Another v. SMITH.

1895. Supreme Court of Minnesota. 61 Minn. 277.

Mitchell, J.—This action was brought to recover damages on the ground that the defendant, assuming to be the agent of his mother, made a contract in her name which was not binding upon her by reason of the fact that it was unauthorized by her.

The ground and form of the professed agent's liability in such cases has been the subject of discussion, but all the authorities are agreed that he is liable in damages to the person dealing with him upon the faith that he possessed the authority assumed. Sheffield v. Ladue, 16 Minn. 346 (388); Jefts v. York, 10 Cush. 392; Baltzen v. Nicolay, 53 N. Y. 467; Mechem, Ag. §§ 541-545. But in whatever phase the question has arisen, or whatever diverse views the courts may entertain as to the precise ground of the liability or form of the remedy, all the authorities are agreed that, to give a party a legal remedy against the professed agent, he must have been ignorant of the want of authority, and have acted upon the faith of the representations, express or implied, that the professed agent had the authority assumed. Hence the law is that when the professed agent, acting in good faith, fully discloses to the other party, at the time, all the facts and circumstances touching the authority under which he assumes to act, so that the other party, from such information or otherwise, is fully informed as to the existence and extent of his authority, he cannot be held liable. Mechem, Ag.. § 546, and cases cited.[1]

Section 2.—Torts.

SWIM v. WILSON.

1891. Supreme Court of California. 90 Cal. 126.

De Haven, J.—The plaintiff was the owner of one hundred shares of stock of a mining corporation, issued to one H. B. Parsons, trustee, and properly endorsed by him. This stock was stolen from plaintiff by an employee in his office, and delivered for sale to the defendant,

[1] "It is material in such cases that the party complaining of a want of authority in the agent should be ignorant of the truth touching the agency. If he has a full knowledge of the facts, or of such facts as fairly and fully put him upon inquiry for them, and he fails to avail himself of such knowledge, or the means of knowledge reasonably accessible to him, he cannot say he was misled, simply on the ground that the party assumed to act as agent without authority, in the absence of fraud." Osborn, C. J., in Newman v. Sylvester, 42 Ind. 106, 113.

who was engaged in the business of buying and selling stocks on commission. At the time of placing the stock in defendant's possession, the thief represented himself as its owner, and the defendant, relying upon this representation, in good faith, and without any notice that the stock was stolen, sold the same in the usual course of business, and subsequently, still without any notice that the person for whom he had acted in making the sale was not the true owner, paid over to him the net proceeds of such sale. Thereafter the plaintiff brought this action to recover the value of said stock, alleging that the defendant had converted the same to his own use, and the facts as above stated appearing, the court in which the action was tried gave judgment against defendant for such value, and from this judgment, and an order refusing him a new trial, the defendant appeals.

It is clear that the defendant's principal did not, by stealing plaintiff's property, acquire any legal right to sell it, and it is equally clear that the defendant, acting for him, and as his agent, did not have any greater right, and his act was therefore wholly unauthorized, and in law was a conversion of plaintiff's property.

"It is no defense to an action of trover that the defendant acted as the agent of another. If the principal is a wrongdoer, the agent is a wrongdoer also. A person is guilty of a conversion who sells the property of another without authority from the owner, notwithstanding he acts under the authority of one claiming to be the owner, and is ignorant of such person's want of title." Kimball v. Billings, 55 Me. 147, 92 Am. Dec. 581; Coles v. Clark, 3 Cush. 399; Koch v. Branch, 44 Mo. 542, 100 Am. Dec. 324.

In Stephens v. Elwell, 4 Maule & S. 259, this principle was applied where an innocent clerk received goods from an agent of his employer, and forwarded them to such employer abroad, and in rendering his decision on the case presented, Lord Ellenborough uses this language: "The only question is, whether this is a conversion in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master; but, nevertheless, his acts may amount to a conversion; for a person is guilty of conversion who intermeddles with my property, and disposes of it, and it is no answer that he acted under the authority of another who had himself no authority to dispose of it."

To hold the defendant liable, under the circumstances disclosed here, may seem upon first impression to be a hardship upon him. But it is a matter of every-day experience that one cannot always be perfectly secure from loss in his dealings with others, and the defendant here is only in the position of a person who has trusted to the honesty of another, and has been deceived. He undertook to act as agent for one who, it now appears, was a thief, and, relying on his representations, aided his principal to convert the plaintiff's property into

money, and it is no greater hardship to require him to pay to the plaintiff its value than it would be to take the same away from the innocent vendee, who purchased and paid for it. And yet it is universally held that the purchaser of stolen chattels, no matter how innocent or free from negligence in the matter, acquires no title to such property as against the owner; and this rule has been applied in this court to the case of an innocent purchaser of shares of stock. Barstow v. Savage Min. Co., 64 Cal. 388, 49 Am. Rep. 705; Sherwood v. Meadow Valley Min. Co., 50 Cal. 412.

The precise question involved here arose in the case of Bercich v. Marye, 9 Nev. 312. In that case, as here, the defendant was a stockbroker who had made a sale of stolen certificates of stock for a stranger, and paid him the proceeds. He was held liable; the court, in the course of its opinion saying: "It is next objected that as the defendant was the innocent agent of the person for whom he received the shares of stock, without knowledge of the felony, no judgment should have been rendered against him. It is well settled that agency is no defense to an action of trover, to which the present action is analogous."

The same conclusion was reached in Kimball v. Billings, 55 Me. 147, 92 Am. Dec. 581, the property sold in that case by the agent being stolen government bonds, payable to bearer. The court there said: "Nor is it any defense that the property sold was government bonds payable to bearer. The *bona fide* purchaser of a stolen bond payable to bearer might perhaps defend his title against even the true owner. But there is no rule of law that secures immunity to the agent of the thief in such cases, nor to the agent of one not a *bona fide* holder. * * * The rule of law protecting *bona fide* purchasers of lost or stolen notes and bonds payable to bearer has never been extended to persons not *bona fide* purchasers, nor to their agents."

Indeed, we discover no difference in principle between the case at bar and that of Rogers v. Huie, 1 Cal. 429, 54 Am. Dec. 300, in which case, Bennett, J., speaking for the court, said: "An auctioneer who receives and sells stolen property is liable for the conversion to the same extent as any other merchant or individual. This is so both upon principle and authority. Upon principal, there is no reason why he should be exempted from liability. The person to whom he sells, and who has paid the amount of the purchase-money, would be compelled to deliver the property to the true owner or pay him its full value, and there is no more hardship in requiring the auctioneer to account for the value of the goods, than there would be in compelling the right owner to lose them, or the purchaser from the auctioneer to pay for them."

It is true that this same case afterwards came before the court, and it was held, in an opinion reported in Rogers v. Huie, 2 Cal. 571, 56

Am. Dec. 363, that an auctioneer who in the regular course of his business receives and sells stolen goods, and pays over the proceeds to the felon without notice that the goods were stolen, is not liable to the true owner as for a conversion. This latter decision, however, cannot be sustained on principle, is opposed to the great weight of authority, and has been practically overruled in the later case of Cerkel v. Waterman, 63 Cal. 34. In that case the defendants, who were commission merchants, sold a quantity of wheat, supposing it to be the property of one Williams, and paid over to him the proceeds of the sale, before they knew of the claim on the plaintiff in that action. There was no fraud or bad faith, but the court held the defendants there liable for the conversion of the wheat.

It was the duty of the defendant in this case to know for whom he acted, and, unless he was willing to take the chances of loss, he ought to have satisfied himself that his principal was able to save him harmless if in the matter of his agency he incurred a personal liability by the conversion of property not belonging to such principal.

Judgment and order affirmed.

Garoutte, J., McFarland, J., and Sharpstein, J., concurred.

Beatty, C. J., and Paterson, J., dissented.

Rehearing denied.[1]

JENNE v. SUTTON.

1881. Supreme Court of New Jersey. 43 N. J. L. 257.

Beasley, C. J.—This action was brought to recover damages for hurts received by the plaintiff by the bursting of a bomb fired in one of the public streets of Jersey City. As the use of a public highway as a place in which to fire such an explosive was illegal, and *per se* constitutes a public nuisance, there can be no question with respect to the legal liability of all persons concerned in the doing of such act, or who caused or procured it to be done, for all the damages proximately resulting. The only debatable question, therefore, seems to be whether the evidence sufficiently connected the plaintiff in error, John F. Jenne, with this illegal transaction. When the case was rested at the trial by the plaintiff, an exception was taken to the refusal of the trial judge to nonsuit; and it is in this respect that the injury just alluded to arises. Was there any evidence on this head on which the jury could legally found a verdict against this defendant?

My examination of the case has led me to conclude that there was evidence of this character, to this measure: such testimony was not entirely demonstrative, but it seems to have made up a *prima facie*

[1] *Accord:* McPheters v. Page, 83 Me. 234; Koch v. Branch, 44 Mo. 542. But see Lewthold v. Fairchild, 35 Minn. 99.

[illegible] The fire-works in question were intended to celebrate the meeting of a political club, known and incorporated under the name of Pendarvis Club. The place of meeting was in a building occupied by the Catholic Institute, where it was customary to hold political meetings, and in a public street or road in which building it was likewise customary to exhibit fire-works. Mr. Jeans, the plaintiff in error, was the president of the club. The meeting on the night in question was advertised to be one of the Pendarvis Club, but the expenses of the fire-works were raised by private subscription. The person who fired the fire-work in the street was an employee in the vaults of the fire-works, and being a witness, stated that one [illegible] came and ordered the exhibition of the fire-works for John F. Jeans for the Pendarvis Club. I was at the Catholic Institute that evening, firing off the fire-works at the request of John F. Jeans. I did not see Mr. Jeans when I received the order; I received the order for the fire-works on the afternoon of the order I received was "Mr. McGee." Speaking of the fire-works, he said: "John F. Jeans paid for these; he paid to the value [illegible] my services were included in the bill." He further said: "I went to see if it was safe that a competent man be sent."

Now, to my audience, here was an amount of evidence which unexplained would justify the finding that the defendant so participated in this affair as to make him responsible for the consequences of Delany's misconduct. Counsel objected to this and said statements in connection with the fact that the defendant paid the bill for the fire-works so ordered, and for the services of the man who exploded them, had a strong tendency to implicate the defendant and to show not only that he ordered the works, but that he personally [illegible] to the place of exhibition. It is not an unreasonable presumption that he intended that those exhibitions should be carried on in the usual manner, which was the usual manner on the occasions of meetings of this club. Such is the just purport [illegible] to the plaintiff, for it was clearly nothing under such circumstances for the acting in the official capacity of the president of the club, [illegible] for all the perils and in the course of a public procession are liable to accrue for the ill effects, without regard to the fact that they [illegible] to such a state were for the benefit of that person. There was a primâ facie case made.

Let the judgment be affirmed.

"If a couple servant takes a horse and cart and is driving [illegible] against the master and not against the servant." 1 Bl. Com. 431. The doctrine of this is questioned by Comyn in his treatise on Contracts, 2d edit. 81.

"Negligence is the omission of an act which an [illegible] would perform. Where an [illegible] is not responsible only [illegible] of [illegible] act of a [illegible] he is not personally responsible to a [illegible] who is injured." The Mayor, &c. [illegible] 97 Mass. [illegible] 1867.

case. The fire-works in question were intended to signalize the meeting of a political club, known and incorporated under the name of Pavonia Club. The place of such meeting was in a building denominated the Catholic Institute, where it was customary to hold political meetings, and in a public street in front of which building it was likewise customary to exhibit fireworks. Mr. Jenne, the plaintiff in error, was the president of this club. The meeting on the night in question was advertised in the name of the Pavonia Club, but the expenses of the fire-works were raised by private subscription. The person who fired the fire-works in the street was an employee of the vendor of the fire-works, and being a witness, stated that one, "Samuel McGee came and ordered the exhibition of the fire-works for John F. Jenne for the Pavonia Club. I was at the Catholic Institute that evening, firing off the fire-works at the request of John F. Jenne; I did not see Mr. Jenne when I received the order; I went and fired off the fire-works on the strength of the order I received from Mr. McGee." Speaking of the fire-works, he said: "John F. Jenne paid for these; he paid twelve dollars; my services were included in that bill." He further said: "I went because it was asked that a competent man be sent."

Now, in my judgment, here was an amount of evidence which unexplained would justify the finding that this defendant so participated in this affair as to make him answerable for the consequences. Mr. McGee's statements were not objected to, and such statements, in connection with the fact that the defendant paid the bill for the fire-works so ordered, and for the services of the man who exploded them, had a strong tendency to implicate the defendant, and to show not only that he ordered the goods, but that he procured them to be used at the place in question. It is not an unreasonable presumption that he intended that these explosives should be set off in the public street, which was the usual place on the occasions of the meeting of that club. Such an act and purpose would make him responsible to the plaintiff, for it can signify nothing, under such circumstances, that he was acting in his official capacity as the president of this corporation, for all the participants in the creation of a public nuisance are liable to answer for its ill effects, without regard to the fact that they in such affair were but the agents of other persons. There was a *prima facie* case made.

Let the judgment be affirmed.[1]

[1] "If a smith's servant lames a horse, while he is shoeing him, an action lies against the master and not against the servant." 1 Bl. Com. 431. The correctness of this is questioned by Cooley in his edition of Blackstone, on page 431.

"Misfeasance is the improper doing of an act which the agent might lawfully do. Where an agent fails to use reasonable care or diligence in the performance of a duty, he will be personally responsible to a third person who is injured. His liability in such cases is put upon the ground that he is a wrong-

BROWN PAPER COMPANY v. DEAN.

1877. Supreme Judicial Court of Massachusetts. 123 Mass. 267.

Tort for the obstruction, from July 3, 1873, to March 3, 1875, of the machinery of the plaintiff's mills in Adams, by water set back by a dam built by Horatio N. Dean, in 1860, lower down the stream. Writ dated March 3, 1875. The case was tried in the superior court, before Dewey, J., with the preceding case, who reported it for the consideration of this court in substance as follows:

The plaintiff corporation was duly organized on June 11, 1873, and the mill property and rights of the firm of Levi L. Brown and others were duly conveyed to the plaintiff. Horatio N. Dean died intestate on August 15, 1872; and after his decease the defendant, who was his son and co-partner, continued to carry on the mill business in the same manner it had been previously carried on, until January 6, 1873, when the heirs of Horatio N. Dean conveyed the mill property to the widow and daughters of Horatio N., and after that date the business of the mills was carried on by the defendant on their account, and acting as their agent, he having a power of attorney from them, dated January 6, 1873, the material parts of which are printed in the margin.

The defendant contended that on these facts he was not personally liable for any damages arising from maintaining the dam as alleged, and took the same exceptions as in the preceding case, excepting that relating to the survival of the action. The jury returned a verdict for the plaintiff. If the exceptions in the preceding case were sustained upon any other ground, except that no action for the alleged cause could be maintained against an administrator, then the verdict in this case was to be set aside, and the case stand for a new trial. If those exceptions were not sustained for any other cause, judgment was to be entered on the verdict in this case, unless the court should be of the opinion that, upon the facts herein stated, this action could not be maintained against the defendant, in which case the verdict was to be set aside, and the judgment entered for the defendant.

In the case at bar, the dam complained of was erected by Horatio N. Dean in his lifetime, while owner of the property, to supply water for the use of his tannery. The defendant had nothing to do with its construction. Before the time covered by the declaration in

doer, and, as such, responsible." Russell, J., in Southern Ry. v. Rowe, 59 S. E. (Ga.) 462, 467.

"In torts the relation of principal and agent does not exist; they are all wrongdoers, and may be sued jointly or separately." Franklin, C., in Berghoff v. McDonald, 87 Ind. 549, 559. In Phelps v. Wait, 30 N. Y. 78, it was held that principal and agent may be sued jointly for the negligence of the latter. The contrary was held in Parsons v. Winchell, 5 Cush. (Mass.) 592.

this case, Horatio N. died, and the defendant became liable to the premises, became the agent of the present owners, and went on the business of the tannery for their benefit under a power of attorney from them. During the time mentioned of, there was no change in the height or structure of the dam in question. It was a permanent structure, and the defendants had certain existing easements and rights connected with it would authorize any change or reconstruction of the structure erected upon the premises by the owners. The power of attorney was only executed to carry on the business of purchasing and tanning hides. There is no claim that the premises of which the defendant had charge were not kept in proper repair as a measure by causing back water and become a nuisance in the manner in which the defendant had used them. The nuisance was created by the dam itself. The injury complained of is permanent and during, by the facts reported, to have been caused by any act of the defendant, authorized or unauthorized, connected with either the creation or maintenance of the alleged obstruction. Carleton v. Redington, 21 Pick. 483; Notes v. Stillman, 24 Conn. 15; Pillsbury v. Moore, 44 Me. 154.

In Bell v. Josselyn, 3 Gray 309, cited by the plaintiff, there was a positive act of negligence on the part of the agent who had charge of the building, from which the plaintiff's injuries arose, and not from a nuisance created or maintained by owners.

In Wanzer Tower Co. v. Allen, 130 Mass. 352, all of the facts are materially distinguished from the present case.

Judgment for the defendant.

FELTUS et al. v. SWAN.

(Supreme Court of Pennsylvania. [illegible])

Error to [illegible]

Action by [illegible] against [illegible] for damages [illegible] [illegible] by [illegible] and others [illegible] [illegible] [illegible]

BROWN PAPER COMPANY v. DEAN.

1877. Supreme Judicial Court of Massachusetts. 123 Mass. 267.

Tort for the obstruction from July 3, 1873, to March 3, 1875, of the machinery of the plaintiff's mills in Adams by water set back by a dam built by Dean's father on their lower down the stream. Writ dated March 3, 1875. The case was tried in the superior court, before Devens, J., and the presiding judge reported it for the consideration of the full court on the following agreed facts:

The plaintiff corporation was duly organized on June 11, 1873, and the mill property was conveyed to it by the firm of E. C. Brown and others [illegible] plaintiff. Thomas N. Dean died intestate on August 13, 1873, leaving his daughter the defendant, who was his sole and only heir, [illegible] to carry on the mill business in the name of the estate [illegible] until January 6, 1873, when the [illegible] Dean executed the mill property to the widow [illegible] Gordon S., and gave that date the [illegible] executed on by the defendant on their accounts and [illegible] having a power of attorney from [illegible] the material parts of which are printed [illegible].

[illegible] on these facts he was not personally [illegible] from maintaining the dam as alleged, [illegible] in the preceding case excepting that [illegible] the plaintiffs in the preceding case were [illegible] and that no action for the alleged [illegible] or abuse of trust, then the verdict [illegible] the case stood for a new trial. If [illegible] exceptions were not sustained for any other cause, judgment was to be entered for the defendant in this case, unless the court should [illegible] the question [illegible] should [illegible] action could [illegible] maintained against the defendant, in which case the verdict was to be set aside and the judgment entered for the defendant.

[illegible] case [illegible] by Horace [illegible] Dean in his personal capacity, to supply [illegible] the [illegible] [illegible] nothing to do with the [illegible] [illegible] declaration [illegible] and, as such, [illegible] Stanton, 12 Pick. 389; Towne v. Fiske, 2 Allen, 497.

The facts [illegible] [illegible] [illegible]

this case, Horatio N. died, and the defendant, having no title to the premises, became the agent of the present owners, and carried on the business at the tannery for their benefit under a power of attorney from them. During the time complained of, there was no change in the height or structure of the dam in question. It was a permanent structure, and the defendant had neither ownership, possession, nor such control as would authorize him to change or remove any such structure erected upon the premises by the owner. The defendant, by the power of attorney, was only employed to carry on the business of purchasing and tanning hides. There is no claim that the premises of which the defendant had charge, and which were not in themselves a nuisance by causing backwater, had become a nuisance by the manner in which the defendant had used them. The nuisance here was created by the dam itself. The injury complained of is therefore not shown, by the facts reported, to have been caused by any act of the defendant, authorized or unauthorized, connected with either the erection or maintenance of the alleged obstruction. Carleton v. Redington, 1 Foster 291; Noyes v. Stillman, 24 Conn. 15; Pillsbury v. Moore, 44 Me. 154.

In Bell v. Josselyn, 3 Gray 309, cited by the plaintiff, there was a positive act of negligence on the part of the agent who had charge of the building, from which the plaintiffs suffered, and not from a nuisance created or maintained by owners.

In Wamesit Power Co. v. Allen, 120 Mass. 352, all of the defendants actively participated in the wrong charged.

Judgment for the defendant.

FELTUS ET AL. v. SWAN.

1884. SUPREME COURT OF MISSISSIPPI. 62 Miss. 415.

HON. J. B. CHRISMAN, Judge.

This is an action for damages brought on the 3d of September, 1884, by J. A. V. Feltus and others against D. D. Withers and B. P. Swan. The declaration avers that the plaintiffs own a plantation known as Deer Park, and that defendant Withers owns an adjoining plantation known as Lochdale, "which is and has been for more than ten years past under the charge and control of defendant Withers, as the owner thereof, and defendant B. P. Swan as the manager and agent thereof, and that more than ten years ago a levee was built by the respective owners of said plantations, and from thence until now has remained for the joint protection thereof against high waters, and it has always been the custom, and plaintiffs were entitled to have the waters from time to time collecting behind and back of said levee and being in and upon their said land, from rain, sipage, and over-

flow, drained and carried away from the same through a certain drain, cut and run around, in, and through said Lochdale plantation, and thence off of plaintiffs' said land, and that it was the duty of defendants, owning and occupying the adjoining close and plantation aforesaid, to open the said drain, that the water might be drained off of plaintiffs' land aforesaid, and plaintiffs' land could only be drained through defendants' said close and plantation; that during the year 1884, from the 1st of January to the 1st of September, large quantities of water, from rain, sipage, and overflow, collected in and driven back upon plaintiffs' land, were obstructed and prevented from running off and away from the land by defendants neglecting and refusing to open the drain aforesaid, which it was their duty to do, and by reason of such neglect and refusal the aforesaid land of plaintiffs for the time aforesaid was rendered unfit to cultivate and greatly damaged, etc."

Swan demurred to the declaration on the ground that, as the agent of Withers, he was not liable for the acts of omission and neglect averred in the declaration. The court sustained the demurrer, and the plaintiffs asked leave to amend their declaration by inserting words therein charging that the neglect and refusal which it was declared produced the damage to the plaintiffs "was malicious and with the intention of injuring the plaintiffs' aforesaid lands." The court refused to grant such leave and dismissed the action as to Swan. The plaintiffs dismissed as to Withers and appealed against Swan.

C. P. Neilson and D. C. Bramlett, for the appellants.

It is not clear that the injury complained of is a mere nonfeasance of the agent—in fact, it occurs to us that we charge a positive wrong. This must be apparent to any one acquainted in theory or fact with the levee system of the Mississippi river. In times of high water, back of all or nearly all levees large quantities of water collect to the height of the river water in front, and this back water must be drained off as the river recedes, otherwise it is more damaging than to have welcomed the overflow. And it is also true that there are natural drains in many sections through which only the water from a large area of land may be carried off. But whether the wrong charge is a misfeasance or nonfeasance, we contend that it is an exception to the general rule which exempts a servant from personal liability to a third person for injuries done by negligence in the discharge of his duties.

Here is a most flagrant outrage done, causing great damage, which was alone in the power of appellee and Withers to avert, and they are equally liable under the declaration here and were properly joined. See 1 Wait's Actions and Defenses 264, 265; Addison on Torts (3d ed.) 933. It was error in the court below to deny our application to amend our declaration.

Carson, Shields & Carson, for the appellee.

With regard to the liability of agents to third persons for *torts,* there is a distinction between acts of misfeasance, or positive wrongs, and nonfeasance, or mere omissions of duty. Story on Agency 311. In the former case (misfeasance), the agent is personally liable to third persons, although authorized by his principal, while in the later (nonfeasance) he is in general solely liable to his principal. See Story on Agency, §§ 308, 309; see also, Story on Bailments, § 404; Denny v. Manhattan Bank, 2 Denio 115; Shearman & Redfield on Negligence, § 111; 1 Chitty Pleadings, 75, 77.

We hold that the allowance of amendments to declarations is within the discretion of the court, and we think the court did not err in disallowing the amendment in this case, for it is evident that it made an entirely new and different action.

Campbell, C. J., delivered the opinion of the court.

The appellee being a mere agent was not liable for an omission of duty except to his principal. Story on Agency, §§ 308, 309; Wharton on Agency, §§ 535, 536; Dunlap's Paley's Agency 396.

The proposed amendment would not have made the declaration good, for whatever motive operated on the agent, the charge against him was only that he had failed to do, and not that he had done anything maliciously, and for nonfeasance or omission to act at all the agent is answerable only to his employer.

Affirmed.[1]

DEAN v. BROCK et al.

1894. Appellate Court of Indiana. 11 Ind. App. 507.

Ross, J.—The appellant brought this action against William P. Brock, George E. Brock, Robert F. Catterson and George N. Catterson, alleging, in substance, that William P. Brock was the owner of certain real estate in the city of Indianapolis, upon which was situated a dwelling house and other necessary outbuildings, among which was a building used as a "water closet or privy"; that the Cattersons were

[1] "A mere nonfeasance, or neglect to perform a duty, however wrongful such negligence may be, cannot constitute a technical trespass, which is a positive act of misfeasance accompanied with force." Scott, J., in Henshaw v. Noble, 7 Ohio St. 226, 231.

To the effect that a servant is not liable for nonfeasance, see Reid v. Humber, 49 Ga. 207; Denny v. Manhattan Co., 2 Denio (N. Y.) 115.

"The term 'nonfeasance' refers to the omission on the part of the agent to perform a duty which he owes to his principal by virtue of the relationship existing between them; but, whenever the omission on the part of the agent consists of his failure to perform a duty which he owes to third persons, then, as to such third persons, his omission amounts to 'misfeasance,' for which he is responsible." Holloway, J., in Hagerty v. Montana Ore Co., 38 Mont. 69, 76. See also Cincinnati, etc., Ry. Co. v. Robertson, 115 Ky. 858.

employed as the agents of William P. Brock to look after and rent said dwelling, collect the rents, pay the taxes and make the necessary repairs to keep the same in a tenantable condition; that on or about June 17, 1892, appellant rented said dwelling from the Cattersons and took immediate possession, and was still in such possession at the commencement of this action, August 24, 1892; that the sills and joists under the floor of said water closet "were rotted and decayed, and had not been replaced, examined or repaired for more than twenty years; all of which said defendants (appellees) well knew, but plaintiff (appellant) was ignorant thereof;" that on the 31st day of July, 1892, while appellant was rightfully in the building, the floor broke through, injuring her, etc.

There are other allegations charging that it was the duty of the appellees to ascertain and know the condition of the building, and to keep it in suitable repair, etc., but we deem it unnecessary, in the determination of this case, to set them out.

The appellees William P. Brock and George E. Brock did not appear, and the record does not show that process was ever served upon them.

The appellees, the Cattersons, filed a joint demurrer to the complaint, which was sustained by the court, and this ruling presents the only question for our consideration.

The contention of counsel is that the Cattersons, who were the agents of William P. Brock, were guilty of negligence in failing to make this building safe for the use for which it was intended; that "their negligence was misfeasance, and not mere nonfeasance."

We think counsel's contention untenable. An agent, while obeying the command or performing the service of the principal, is not justified in committing a tort, and if he does, not only the principal but the agent, may be made to answer in damages therefor. But where a duty rests on the principal and not on the agent, its nonperformance by the latter creates no liability against him, if injury results. True he may owe a duty to the principal to faithfully discharge his duties as agent, but he owes no duty to others except that in the performance of those duties he shall not do anything which will cause injury to them. If the agent fails to perform a duty which he owes to the principal, and by reason of such non-performance or neglect of duty a third person sustains injury, no action can be maintained against the agent by such third person on account thereof. Mechem on Agency, § 539; Bishop Noncontract Law, § 695; Crandall v. Loomis, 56 Vt. 664; 1 Am. & Eng. Ency. Law 406, and cases cited.

Great confusion has apparently crept into many cases from a failure to observe the proper distinction between nonfeasance and misfeasance. Nonfeasance is the failure to do that which one by reason of his undertaking, and not because imposed upon him as a legal

duty, he agrees to do for another; that which is imposed upon him merely by virtue of his relation to his principal.

Misfeasance, on the contrary, may consist in failing to do that which is imposed as a duty, or in doing for another, in an improper manner, that which the principal ought to have done. As of the latter class would be where an agent actually undertakes and enters upon the performance of a certain work for the principal, in the execution of which it is his duty to use reasonable care in the manner of executing it, so as not to cause injury to others, and he cannot, by failing to exercise such care, either while performing the work or by abandoning it in an uncompleted condition and leaving it unguarded or unsafe, exempt himself from liability to those who may suffer injury by reason of such negligence. Osborne v. Morgan, 130 Mass. 102.

This case, however, cannot be said to be one of misfeasance, because the appellees, the Cattersons, were under no legal duty to keep the property in repair and safe for use, neither did they, in making the repairs, do so in a negligent manner. They simply neglected to perform for their principal the duty which he owed to his tenants. Their failure to do was merely a nonfeasance and not a misfeasance.

The cases cited by counsel are all cases where the agent was held liable for misfeasance. In none of those cases did the court hold that the agent was liable for failing to perform a duty owing from the principal to another who was injured by reason of such neglect of duty. That when an agent owes a duty and one to whom the duty is owing is injured by reason of the failure to perform such duty, the agent is liable, does not admit of question for he is liable for the result of his neglect to perform any duty devolving upon him in his individual character. Not so, however, when he is simply the agent of the principal, to perform the duty owing from the principal to others.

The complaint stated no cause of action against the appellees, the Cattersons.

Judgment affirmed.

Filed November 13, 1894; petition for a rehearing overruled January 30, 1895.[1]

[1] *Accord:* Delaney v. Rochereau, 34 La. Ann. 1123; Drake v. Hagan, 108 Tenn. 265 (*semble*).
Contra: Baird v. Shipman, 132 Ill. 16; Carson v. Quinn (Mo.), 105 S. W 1088.

VAN ANTWERP v. LINTON.

1895. Supreme Court of New York. 35 N. Y. Sup. 318.

Parker, J.—This appeal brings up a judgment entered on the dismissal of the complaint after the opening address to the jury by plaintiff's counsel, which was taken down. From the complaint and opening, it appears that the plaintiff was injured by the fall of the grand stand at the Yale-Princeton football game on Thanksgiving day, 1890, on grounds in the possession of the Brooklyn's Limited, a corporation organized under the laws of the state of New York. The action was brought against the Brooklyn's Limited, and Messrs. Linton, Chauncey, and Wallace, who were appointed a committee of the board of directors of the Brooklyn's Limited, to put the grounds in condition for the exhibition of the game. The Brooklyn's Limited made default, and the question presented to the trial court, upon the motion to dismiss the complaint, was whether, from the complaint and opening, a cause of action against the individual defendants was stated. It was conceded that the individual defendants did not have any lease from the Brooklyn's Limited, nor any one else, running to them; and the sole ground upon which the plaintiff sought to charge them with liability was that they were appointed a committee by the directors of the corporation to erect a stand, and otherwise provide for the reception and convenience of the public, and that by reason of their negligent omission of duty there was a defective construction of the stand, which led to its falling, resulting in injury to the plaintiff. As it was conceded that the Brooklyn's Limited was a domestic corporation duly organized under the laws of this state, and in possession of the premises when the stand was erected, and also at the time of the accident, liability against the individual defendants could not be predicated upon their being directors, officers, or stockholders in such corporation. Demarest v. Flack, 128 N. Y. 205, 28 N. E. 645. That they were the agents of the corporation in directing and superintending the erection of the stand was assumed by the learned trial judge, as he was bound to do, upon the complaint and opening; and he reached the conclusion that the acts with which they were charged constituted nonfeasance and not misfeasance. If he was right in such respect, it is conceded that the complaint was properly dismissed; for, whatever may be the rule in other jurisdictions, it is conceded that in this state an agent or servant is not liable to third persons for nonfeasance. As between himself and his master, he is bound to serve him with fidelity; and for a breach of his duty he becomes liable to the master, who, in turn, may be charged in damages for injuries to third persons occasioned by the nonfeasance of the servant. For misfeasance the agent is generally liable to third parties suffering thereby. The distinction between non-

VAN ANTWERP v. GATTY.

1868. Superior Court of New York. 34 N. Y. Sup. 502.

Appeal. — This action was brought by a stockholder on the discovery of the corruption of the directors in the purchase by plaintiff's testator of the Broadway Railroad stock. The complaint and opinion of the court below sufficiently appear. [illegible] all of the grand stock of the [illegible] Railroad Company on Thanksgiving day, 1865, on ground [illegible] Limited, a corporation organized under the laws of the state of New York. The action was brought [illegible] Limited and Messrs. [illegible] Company, was [illegible] a committee of the board of directors of the Broadway Railroad to put the grounds in readiness for the [illegible] of August. The Broadway Railroad Company [illegible] preparations [illegible] the trial court, upon the complaint [illegible] plaintiff's testator [illegible] the complainant [illegible] that the [illegible] did not have [illegible] and that [illegible] would [illegible] to charge [illegible] appointed a committee by [illegible] to erect a stand [illegible] preparations [illegible] convenience of the public and that by reason [illegible] of duty there was a defective condition [illegible] and to the testator, resulting in injury to [illegible]. [illegible] that the Broadway Railroad was a [illegible] corporation [illegible] under the laws of this state and in possession of [illegible] not fixed and erected, and also at the time [illegible] against the individual defendants [illegible] as [illegible] being directors, officers, or stockholders [illegible] Clarke (47 N. Y. 592; 2 N. Y. Sup. [illegible]). That the agents of the corporation in directing and superintending the [illegible] of the road were selected by the board [illegible] and to [illegible] upon the complaints and examined [illegible] conclusion that the acts with which they were charged [illegible] maintenance and not misfeasance. It [illegible] that the complaint was [illegible] dismissed [illegible] may be made to other persons [illegible], it is conceded [illegible] not liable to [illegible] third persons for [illegible]. [illegible] himself and his property [illegible] bound to [illegible] and for a breach of [illegible] be become liable [illegible] which may be caused [illegible] damage [illegible] caused by the negligence of the servant. [illegible] agent is generally [illegible] third persons [illegible]. The distinction between [illegible]

feasance and misfeasance has been expressed by the courts of this state as follows:

"If the duty omitted by the agent or servant devolved upon him purely from his agency or employment, his omission is only of a duty he owes his principal or master, and the master alone is liable; while, if the duty rests upon him in his individual character, and was one that the law imposed upon him independently of his agency or employment, then he is liable."

Appellant urges that although these individual defendents were charged by the corporation with the duty of erecting this stand, and the acts complained of consisted in omitting to provide for a construction of sufficient strength to withstand the strain to which it was subjected, nevertheless they were guilty of misfeasance, rather than nonfeasance. With commendable diligence, he has brought to our attention authorities in other jurisdictions tending to support his contention; but we refrain from their consideration, because it is our understanding that the courts of this state have determined otherwise. In Murray v. Usher, 117 N. Y. 542, 23 N. E. 564, the plaintiff, while employed upon a platform in a sawmill belonging to two of the defendants, sustained injuries, by reason of its falling, which occasioned his death. His administrator brought an action against the owners of the mill and one Lewis, who was their superintendent having general charge of the business, and being specially instructed to look after the necessary repairs, which included the duty of inspecting the platform from time to time to see that it was kept in a safe condition. Judgment was recovered against all of the defendants. In the court of appeals the question of the superintendent's liability was considered; the court holding that the omission of the superintendent to perform the duty devolving upon him constituted a nonfeasance, for which he was not liable in a civil action, but that his employers were. That case, it will be observed, is directly in point with the one under consideration. Lewis, the superintendent, neglected to perform the duty which his employers had devolved upon him, and such neglect led to the fall of the platform, which caused plaintiff's injury. In this case the defendants were engaged in superintending the erection of the stand. As more than one was charged with such duty, they were called a committee. But the duties devolved upon them were of the same general character as in Murray's case, and the charge is that the fall of the stand was due to their neglect to properly discharge the obligations put upon them by the corporation. In Burns v. Pethcal, 75 Hun 437, 27 N. Y. S. 499, an attempt was made to recover of a foreman for the loss of the life of an employe, due, it was charged, to the omission of the foreman to warn the dead man of the danger of working in a particular place. There was a recovery at the circuit, but the general term reversed the judgment; holding that a servant is not liable jointly with his master, where the negligence of the servant consists of an omission

of duty devolved upon him by his employment, although he may be liable where he omits to perform a duty which rests upon him in his individual character, and one which the law imposes upon him independently of his employment. These cases fully sustain the decision of the trial court. The judgment should be affirmed, with costs.[1]

LOUGH v. JOHN DAVIS & COMPANY.

1902. Supreme Court of Washington. 30 Wash. 204.

Dunbar, J.—This is an action against an agent, who was authorized to rent and repair the tenement house described in the complaint, for permitting the house to become unsafe for want of repairs, from which cause the plaintiff was injured. Paragraph 2 of the complaint is as follows: "That at all said times, and for a long time before, the above named defendant, Sheldon R. Webb, has been and still is the owner of that certain real estate property known as lots 8 and 9, in block 38, of A. A. Denny's addition to the city of Seattle, and of the buildings thereon situated, and that the above named defendant John Davis & Co. has had, and still has, sole and absolute control and management of said real property as the servant and agent of said Sheldon R. Webb, with full power, authority, and direction from their said principal to rent and repair the same, and to keep the same in repair and safe condition for tenants." The other pertinent allegations are to the effect that a wide veranda, extending along two sides of the building about fifteen feet from the ground, was used in common by all of the tenants, and was enclosed by a railing; that the railing was allowed to become old, rotten, and unsafe through negligence of the defendants, and that, while the plaintiff was playing on the said veranda, by reason of the unsafe condition, the railing gave way, and she fell from said veranda from a height of fifteen feet and more from the ground, and was injured, etc. To this complaint the defendant John Davis & Co. interposed a demurrer on the ground that it did not state facts sufficient to constitute a cause of action

[1] *Contra:* Mayer v. Thompson-Hutchinson Building Co., 104 Ala. 611; Ellis v. McNaughton, 76 Mich. 237. On page 242 of the latter case Morse, J., said: "Misfeasance may involve to some extent the idea of not doing; as where an agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do under the circumstances; as, for instance, when he does not exercise that care which a due regard for the rights of others would require. This was not doing, but it is the *not* doing of that which is not imposed upon the agent merely by his relation to his principal, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes negligence in any relation, and is actionable." To same effect see opinion of Gray, C. J., in Osborne v. Morgan, 130 Mass. 102.

of duty devolved upon him by his employment, although he may be liable where he owes no personal duty upon him in his individual character, and for which he has imposed upon him in disobedience of his employment. The judgment [illegible] be affirmed, with costs.

[illegible] v. DAVIS & COMPANY.

1902. [illegible] or Washington. 30 Wash. 324.

[illegible] a contractor agents or agent, who was authorized to [illegible] improvement house described in the complaint, for [illegible] to become unsafe for want of repairs from which [illegible] was injured. Paragraph 2 of the complaint [illegible] that [illegible] and since, and for a long time before, the [illegible] Sheldon & Webb, Inc. been and still is the owner [illegible] certain real estate property known as lots 8 and 9, in [illegible] A. Denny's Addition to the city of Seattle, and of the [illegible] and that the above-named defendant John [illegible] and has, sole and absolute control and management [illegible] property as the servant and agent of said [illegible] with full power, authority, and direction from [illegible] to rent and repair the same, and to keep the same in repair [illegible] for rentals." The other pertinent allegations [illegible] a wide veranda, extending along two sides of the [illegible] fifteen feet from the ground, was used in connection [illegible] and was enclosed by a railing, that the railing was [illegible] old rotten, and unsafe through negligence of the [illegible] and that, while the plaintiff was playing on the said veranda, [illegible] of the unsafe condition, the railing gave way, and the [illegible] a height of fifteen feet and more from the ground [illegible] was injured, etc. To this complaint the defendant John [illegible] interposed a demurrer on the ground that it did not [illegible] sufficient to constitute a cause of action

[illegible] Mason, [illegible] Hamilton, Lyon, for Appellant; Ellis & Vaughan, for [illegible] Mount, J. [illegible] [illegible] [illegible]

against it, the demurring defendant. There was no appearance by Sheldon R. Webb. The demurrer was sustained, and, the plaintiff electing to stand on her complaint, judgment was entered on the demurrer. From such judgment sustaining the demurrer this appeal was taken.

The respondent has interposed a motion to dismiss the appeal for the reasons: (1) That the judgment appealed from is not a final judgment; (2) because no final judgment has been entered in this action; (3) because this court has no jurisdiction to hear and determine this action upon the attempted appeal herein. The idea embraced in all these assignments is that the judgment is not final, because there has been no disposition of the case so far as one of the defendants, Sheldon R. Webb, is concerned. Many authorities are cited, but we will notice only those from this court. Freeman v. Ambrose, 12 Wash. 1, 40 Pac. 381, simply decided that an order setting aside a default and vacating judgment thereon was not appealable. Nelson v. Denny, 26 Wash. 327, 67 Pac. 78, is simply an affirmance of the doctrine announced in that case. In Johnson v. Lighthouse, 8 Wash. 32, 35 Pac. 403, the appeal was dismissed because the Pacific Loan & Trust Investment Company was not served with notice of appeal; but in that case the said company had appeared in the action and filed a demurrer to the complaint. Fairfield v. Binnian, 13 Wash. 1, 42 Pac. 632, was a case where a notice of appeal had not been given to a party who had appeared in the court below by intervention, and it was held that he was as much a party in interest as the parties who originally appeared in the action, and was entitled to a notice of appeal from any judgment upon issues raised by the original parties. These cases hardly seem to us to be in point on the questions involved here. In this case Sheldon R. Webb never had become a party to the action, never had appeared in the action nor been served with notice, and the case falls squarely within Keef v. Tibbals, 18 Wash. 656, 52 Pac. 227, where it was held that, where a complaint has been filed against several defendants, and before service has been obtained against all of them the complaint has been stricken on motion of those served, an appeal lies from such order striking the complaint, although there has been no dismissal or other action taken with reference to the defendants not served. The motion to dismiss will be denied.

It is the contention of the respondent that the law is well settled that for a misfeasance the agent is personally liable, but that he is never liable for a mere nonfeasance; and that, the respondent being charged only with a nonfeasance or neglect to do its duty, and not with any misfeasance or act which it ought not to do, the complaint on its face shows that it is not liable, and that the demurrer was therefore properly sustained. This rule is announced by some of the law writers and many of the courts. One of the leading cases

sustaining this doctrine is Delaney v. Rochereau, 34 La. Ann. 1123, 44 Am. Rep. 456, where it was held that under the doctrine of both the common and civil law, agents are not liable to third persons for nonfeasance or mere omissions of duty, being responsible to such parties only for the actual commission of those positive wrongs for which they would be otherwise accountable in their individual capacity under obligations common to all men. In this case a balcony which needed repairs fell, fatally injuring the plaintiff; and, while the agent was not responsible for the injured party's being in the house at that particular time,—he having obtained entrance by means of a key obtained from some one else,—the case is discussed and judgment based upon the doctrine above announced. This is also the established doctrine in New York. The case of Carey v. Rochereau (C. C.), 16 Fed. 87, is a Louisiana case, and bases its decision on Delaney v. Rochereau, *supra*, without discussion. Labadie v. Hawley, 61 Texas 177, 48 Am. Rep. 278, held, in accordance with the same rule, that an agent renting his principal's house with authority to construct a cooking range was not liable for injury to an adjoining proprietor, caused by the use of the range; citing Story on Agency 309, and other authorities. In Feltus v. Swan, 62 Miss. 415, it was held that an agent in charge of a plantation was not liable to the owner of an adjoining plantation for damage resulting from the malicious neglect and refusal of the agent to keep open a drain which it was his duty as such agent to keep open. The announcement of this doctrine is accredited by many of the courts endorsing it to the opinion in Lane v. Cotton, 12 Mod. 472, but it was, as a matter of fact, announced only incidentally in that case in a dissenting opinion. The question of the responsibility of the agent could not have been before that court, for the action was against a postmaster for the loss of a letter which was taken from the mail by a clerk, and it was only the responsibility of the master, and not that of the servant or agent, which was under discussion.

The reason assigned to sustain this rule is that the responsibility must arise from some express or implied obligations between the particular parties standing in privity of law or contract with each other. If this be true, it is difficult to see what difference there is in the obligation to their principal between the commission of an act by the agents which they are bound to their principal not to do and the omission of an act which they have obligated themselves to their principal to do. They certainly stand in privity of law or contract with their principal exactly as much in the one instance as in the other, for the obligation to do what ought to be done is no more strongly implied in the ordinary contract of agency than is the obligation not to do what ought not to be done. This reason for the rule not being tenable, and no other reason being obvious, the rule itself ought not to obtain; for jurisprudence does not concern itself with

such attenuated refinements. It rests upon broad and comprehensive principles in its attempt to promote rights and redress wrongs. If it takes note of a distinction, such distinction will be a practical one, founded on a difference in principle, and not a distinction without a difference: and there can be no distinction in principle between the acts of a servant who puts in motion an agency which, in its wrongful operation, injures his neighbor, and the acts of a servant who, when he sees such agency in motion, and when it is his duty to control it, negligently refuses to do his duty, and suffers it to operate to the damage of another. There is certainly no difference in moral responsibility, there should be none in legal responsibility. Of course, if the omission of the act or the nonfeasance does not involve a non-performance of duty, then the responsibility would not attach. If it does involve a non-performance of duty to such an extent that the agent is liable to the principal for the damages ensuing from his neglect, there is no hardship in compelling him to respond directly to the injured party. Such practise is less circuitous than that which necessitates first the suing of the master by the party injured, and then a suit by the master against the servant to recoup the damages.

But the honorable judge who wrote the opinion in Delaney v. Rochereau, *supra,* was mistaken in his announcement that the civil law endorsed the distinction upon which his decision was based, for, while the doctrine is stated in the Justinian Code that no man could usually be made liable for a mere omission to act, it was otherwise when the omission to act involved a negligence of duty. Domat argues that, as an agent is at liberty not to accept the order and power which are given him, so he is bound, if he does accept the order, to execute it; and, if he failed to do so, he will be liable for the damages which shall have occasioned by his not acting. Under the Aquillian law the distinction between omission and commission was not recognized under such circumstances. In the ninth digest of the Aquillian law the following instance is given: One servant lights a fire, and leaves it to another. The latter neglects to check the fire at the proper time and place, and a villa is burned. The first servant was charged with no negligence, because it was his duty to light the fire, and it is argued, very sensibly, that, if the second could not be charged because not putting out the fire was simply an omission of duty, there would be a miscarriage of justice. Is the keeper of a drawbridge, whose duty it is to close the draw after a ship passes through, and who negligently fails to perform that duty, allowing a car loaded with passengers to be hurled into the river below, to escape responsibility to the injured, while the man who attempts to operate it, but, in so attempting operates it negligently and unskilfully, is held responsible? Instances in the ordinary transactions of

life might be multiplied almost without end, the very statement of which shows conclusively the fallacy of the rule.

The attempt by the courts to maintain this indistinguishable distinction has led to many inconsistent decisions. Thus, in Albro v. Jaquith, 4 Gray 99, 64 Am. Dec. 56, the plaintiff was not allowed to recover of the superintendent of a canal company for damages caused by negligence in the management of the apparatus used for the purpose of generating, containing, and burning inflammable gas; the superintendent being the agent of the company, and being charged with carelessly, negligently, and unskilfully managing the business. It was held that he was not charged with any direct act of misfeasance, but only with nonfeasance, and that there was no redress, because, as the court said, the obligation to be faithful and diligent was founded in an express contract with his principal. As we have before indicated, this would be equally true of the acts of commission or misfeasance in his stewardship. But in Bell v. Josselyn, 3 Gray 309, 63 Am. Dec. 741,—also a Massachusetts case, and decided the same year,—it was held that an agent who negligently directed water to be admitted to a water pipe was liable to a third person because such action was misfeasance. In that case it was not claimed that the admission of water to the pipe was negligent or wrongful, but the negligent act or omission was in allowing the pipe to become obstructed,—certainly as pure an omission or nonfeasance as could be conceived of. But the court, in order to maintain the distinction which it deemed itself bound by precedent to do, virtually obliterated the distinction by the following circuitous reasoning: "The defendant's omission to examine the state of the pipes in the house before causing the water to be let on was a nonfeasance. But if he had not caused the water to be let on, that nonfeasance would not have injured the plaintiff. If he had examined the pipes, and left them in a proper condition, and then caused the letting on of the water, there would have been neither nonfeasance nor misfeasance. As the facts are, the nonfeasance caused the act done to be a misfeasance. But from which did the plaintiff suffer? Clearly, from the act done, which was not less a misfeasance by reason of it being preceded by a nonfeasance."

Much more cogent and judicial is the reasoning of the same court many years after in Osborne v. Morgan, 130 Mass. 102, 39 Am. Rep. 437, where an agent of premises was held responsible to a third person for suffering to remain suspended from a room a tackle block, which fell upon and injured the plaintiff. The court, speaking through Chief Justice Gray, said: "The principal reason assigned was that no misfeasance or positive act of wrong was charged, and that for nonfeasance,—which was merely negligence in the performance of a duty arising from some express or implied contract with his principal or employer,—an agent or servant was re-

sponsible to him only, and not to any third person. It is often said in the books that an agent is responsible to third persons for misfeasance only, and not for nonfeasance. And it is doubtless true that, if an agent never does anything toward carrying out his contract with his principal, but wholly omits and neglects to do so, the principal is the only person who can maintain any action against him for the nonfeasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as to not cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway, and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance, or doing nothing; but it is misfeasance, doing improperly."

There is still another class of cases which hold what seems to us to be the correct doctrine, viz., that the obligation, whether for misfeasance or nonfeasance does not rest in contract at all, but is a common-law obligation devolving upon every responsible person to so use that which he controls as not to injure another, whether he is in the operation of his own property as principal or in the operation of the property of another as agent. One of the leading cases maintaining this view is Baird v. Shipman, a case decided in 1890, and reported in 132 Ill. 16, 23 N. E. 384, 7 L. R. A. 128, 22 Am. St. Rep. 504. There it was held that an agent who has complete control of a house belonging to an absent principal, and who lets the house in a dangerous condition, promising to repair it, is responsible to the third person injured by an accident caused by want of such repair. There is nothing to distinguish this case from the case at bar excepting the promise to repair, and that does not seem to have been deemed by the court an important feature; but the case was decided upon the broad principle above announced. Said the court: "It is not his contract with the principal which exposes him to or protects him from liability to third persons, but his common-law obligation to so use that which he controls as not to injure another. That obligation is neither increased nor diminished by his entrance upon the duties of agency, nor can its breach be excused by the plea that his principal is chargeable. * * * If the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his act,"—citing approvingly Osborne v. Morgan, *supra*.

To the same effect is Mayer v. Thompson-Hutchison Building Co., 104 Ala. 611, 16 South. 620, 28 L. R. A. 433, 53 Am. St. Rep. 88. The court there, after noticing the doctrine that the agent can be held liable to third persons for misfeasance only, says: "It is difficult

to apply the same principles which govern in matters of contract between an agent and third persons to the torts of an agent which inflict injury on third persons, whether they be of misfeasance or nonfeasance, or to give sound reason why a person who, while acting as principal, would be individually liable to third persons for an omission of duty, becomes exempt from liability for the same omission of duty because he was acting as servant or agent. The tort is none the less a tort to the third person whether suffered from one acting as principal or agent, and his rights ought to be the same against the one whose neglect of duty has caused the injury." In that case Baird v. Shipman, *supra*, is cited approvingly, with the remark that the rule laid down in that case is the better rule. So, in Ellis v. McNaughton, 76 Mich. 237, 42 N. W. 1113, 15 Am. St. 308, it was held that an agent who had entire control of premises was liable for injuries resulting from the removal of a walk on the premises by one of his employees, contrary to his orders, if, after such removal, he knew of the dangerous condition of the premises, and allowed them to remain in that condition. It would seem that, if there is anything in definitions, this was a pure nonfeasance, and yet the court, in trying to harmonize the distinction with the general rule announced and above discussed, said, speaking of the agent's duty in relation to the work: "Every day it was so permitted to remain, when the defendant had the entire control of it, and the authority, without question, to replace it, was a wrong and a misfeasance."

It is also said that, irrespective of his principal, the agent was bound while doing the work to so use the premises, including the sidewalk, as not to injure others. Misfeasance, said the court, may involve the omission to do something which ought to be done,—as when an agent engaged in the performance of his undertaking omits to do something which it is his duty to do under the circumstances, as when he does not exercise that degree of care which due regard for the rights of others required. To the same effect, Campbell v. Portland Sugar Co., 62 Me. 552, 16 Am. Rep. 503. In Lottman v. Barnett, 62 Mo. 159, it was held that one having the general charge and superintendence of the construction of a building was responsible for the killing of a workman caused by the falling of a wall, which resulted from the giving way of supports on which the wall rested under the working of a jackscrew, although the appliance was put to work under the immediate direction of another person, employed by the owner of the building, and while the architect was absent, where it appeared that the manager of the jackscrew was employed under the advice of the architect, and subject to his discretion, and that he knew and approved of the method adopted for effecting the raising. Whether the wall fell because the plan for raising it was a bad one, or because the supports were inadequate, it was held that in either case the disaster was attributable to positive misfeasance for negligence in a work which the architect had undertaken, but in which

he failed to exhibit the care and skill which the law imposed upon him. To make this distinction more shadowy, if possible, Mr. Mechem, in his work on Agency (§ 572), after announcing the general rule, says: "Some confusion has crept into certain cases from a failure to observe clearly the distinction between nonfeasance and misfeasance. As has been said, the agent is not liable to strangers for injuries sustained by them because he did not undertake the performance of some duty which he owed to his principal, and imposed upon him by his relation, which is nonfeasance. Misfeasance may involve, also, to some extent, the idea of not doing,—as where the agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do under the circumstances; does not take that precaution—does not exercise that care—which a due regard for the rights of others requires. All this is not doing, but it is not the not doing of that which is imposed upon the agent merely by virtue of his relation, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not-doing which constitutes actionable negligence in any relation."

The author then quotes approvingly the language of Chief Justice Gray in Osborne v. Morgan, *supra,* and of Judge Metcalf in Bell v. Josselyn, *supra,* so that it will be seen that, even according to Mr. Mechem, a lack of care and a lack of precaution, when once the duty is assumed, are as much misfeasance as an active misdoing. The irresistible logic of his statement is that the agent is responsible to third persons when he is negligent in the performance of the duties which he undertakes, whether such act be termed misfeasance or nonfeasance. The rule is thus announced in 1 Am. & Eng. Ency. Law (1st ed.), p. 407: "Where a principal engages an agent to do a certain work, and to take entire control over it, while the principal does not interfere, but leaves it entirely with the agent, the agent, and not the principal, will be liable to third parties for injuries or damages sustained by the negligence or unskilful manner in which the work is done."

The question of whether or not the principal is liable is not under discussion here. In the same section, and in another paragraph, that author announces that an agent is, in general, not liable to third parties for acts of negligence for non-performance of duty; that as such he is only responsible to the principal, and the principal to the third party. So that in the mind of the author the distinction must have been established between an agent that did not have complete or entire control and one who did. There is no other way of harmonizing the two statements. This is, in effect, the same rule enunciated by Mr. Wharton in his work on Agency (§ 538). Under the announcement that "wherever there is liberty there is liability," it is said: "Hence, to strike at the general principle that lies at the basis of the adjudication we have just noticed, wherever the agent is

at liberty to choose his own mode of action, then he is distinctively liable in damages, if by such mode of action he invades another's rights." The same doctrine is announced in § 537, where it is said: "Where an agent, who has general liberty of action, injures a third person, there the agent is personally liable for negligent as well as for malicious acts."

The author here discriminates between an agent and a servant, holding that a servant is a part of the machinery by which the master works, and there is no emancipation or liberty of action; but that this reasoning does not apply to agents who have complete control, and therefore perfect liberty of action. Doubtless much of the mist and fog which have enveloped the decisions on this subject are due to confusing the omission of an act which one is not bound to perform with the imperfect performance of an act to which he is bound. In other words, whoever undertakes a duty, and is clothed with authority to perform that duty, is responsible to the party injured for negligent imperfection in the discharge of such duty, on the broad doctrine announced above that he is obligated in transacting business to so transact it that his neighbor shall not thereby be injured; but there is no liability for the non-performance of a duty not assumed, or not independently controlled. But for neither the non-performance nor malperformance of a positive duty can one escape responsibility, whether that duty is imposed by contract or by general obligation, for under any and all circumstances it is the essence of negligence to omit to do something which ought to be done. While some detached expressions of Mr. Wharton have been quoted in support of the distinction contended for by the respondent, that author puts the question at rest in his work on the Law of Negligence (2d ed., § 535), where he says: "The mere fact that I am the agent, in doing the injurious act, of another, does not relieve me from liability to third persons for hurt this act inflicts on them. Judge Story, indeed, tells us that for the omissions of the agent the principal alone is liable, while for misfeasances the agent is also liable; but this distinction, as has been already shown, can no longer be sustained. The true doctrine is that when an agent is employed to work on a particular thing, and has surrendered the thing in question into the principal's hands, then the agent ceases to be liable to third persons for hurt received by them from such thing, though the hurt is remotely due to the agent's negligence; the reason being that the casual relation between the agent and the person hurt is broken by the interposition of the principal as a distinct center of legal responsibilities and duties. But wherever there is no such interruption of casual connection,—in other words, wherever the agent's negligence directly injures a stranger, the agent having liberty of action in respect to the injury,—then such stranger can recover from the agent damages for the injury."

There is some contention in respondent's brief on the alleged bar-

a liberty to choose his own mode of action, then he is distinctively liable in damages if his said mode of action he invades another's rights." The same [illegible] in § 537, where it is said: "Where an agent, who has general liberty of action, injures a third person, there the agent is personally liable for misfeasance as well as for nonfeasance."

The author here [illegible] between an agent and a servant, holding that a servant has not the discretion by which the master works, and therefore no [illegible] liberty of action; but that this reasoning does not apply to agents who have complex powers, and [illegible] perfect liberty of action. Doubtless [illegible] which have developed the decisions on this subject [illegible] confusion the question of an act which [illegible] with the incorrect performance of an act to [illegible]. In other words, wherever undertakes a duty, and [illegible] authority to perform that duty is responsible to the [illegible] for negligent imperfection in the discharge of such [illegible] doctrine announced above that he is obliged to [illegible] so as transact it that his neighbor shall not [illegible] there is no liability for the non-performance [illegible] or not independently controlled. But [illegible] performance nor nonperformance of a positive duty [illegible] whether that duty is imposed by [illegible] relation, for under any and all circumstances it is [illegible] negligence to omit to do something which ought to be done. [illegible] detached expressions of Mr. Wharton [illegible] question [illegible] of the distinction contended for by the respondent does [illegible] the question at rest is his work on the Law of [illegible], § 535), where he says: "The mere fact that I am the agent [illegible] another does not relieve me from [illegible] to third persons for injury [illegible] act. [illegible] indeed, only [illegible] for the misfeasance of the agent for [illegible] is liable, while for misfeasances the agent is also [illegible] as has been already shown, [illegible] to injury to [illegible]. The true doctrine is that when an agent is employed to [illegible] a [illegible] thing, and has surrendered the thing in question [illegible] principal's hands, then the agent ceases to be liable to third [illegible] for injury received by them from such thing, though the [illegible] due to the agent's negligence; the reason being that the [illegible] between the agent and the person [illegible] by the [illegible] of the principal is a distinct center of legal responsibilities and duties. But wherever there is no such interruption of [illegible]—in other words, wherever the agent's negligence [illegible] injury to a stranger, the agent having liberty of action in regard to the injury—then such stranger can recover from the agent damages for the injury."

There is [illegible] complaint's brief on the alleged par-

renness of the allegations of the complaint, but we think the allegations were ample to show that the respondent was authorized to keep the building in repair; that it undertook that office or duty, and was in complete control of the work. It is alleged that it was in absolute control and management, with full power, authority, and direction to repair, and to allege that it agreed to do so would only be to allege the agreement to do the duty which the law imposed upon it after it had assumed the control and management which is alleged.

Our conclusion is that the complaint states a cause of action against the respondent. The judgment is therefore reversed, with instructions to the lower court to overrule the demurrer to the complaint.[1]

[1] See Frorer v. Baker, 137 Ill. App. 588.

CHAPTER X.

UNDISCLOSED PRINCIPAL.

Section 1.—Liability of Third Party to Principal.

SCHAEFER ET AL. v. HENKEL.

1878. COURT OF APPEALS OF NEW YORK. 75 N. Y. 378.

MILLER, J.—The plaintiffs were not parties to the lease upon which this action was brought. It was not signed by them. Their names did not appear in it, and there was nothing in the lease to show that they had anything to do with or any interest in the demised premises or the execution of the lease, or that it was executed in their behalf. It was made by one Brown, as lessor, who is described therein, and who signed it, as agent; but it is not stated in the lease for whom he acted. The covenants are all between "J. Romaine Brown, agent, the party of the first part," and the defendant, as party of the second part; and it is not made to appear that the defendant had any knowledge or intimation whatever that Brown was acting on the behalf of the plaintiffs or for their benefit. For whom Brown was agent was not made known to the defendant, and it only appears by parol proof upon the trial that Brown was authorized orally by the plaintiffs to make a demise of the premises described in the lease. The signature of Brown is as agent, and his seal is attached to the instrument, and the same is also signed and sealed by the defendant. The plaintiffs, without any assignment of Brown's interest under the lease, bring this action to recover the rent unpaid, upon the ground that Brown merely acted as their agent by their authority, and that they are the actual parties in interest. The question to be determined is whether the actual owners of the lease, which is in the nature of a deed *inter partes,* which was not and does not on its face show that it was executed by them, but which does show an execution by a third person, claiming to act as agent without disclosing the name of his principal, and which contains covenants between the parties actually signing and sealing the same, can maintain an action upon it for the rent reserved therein,

even although the person who executed the same, describing himself "agent and party of the first part," had oral authority to enter into the contract, and acted as the owner's agent in the transaction. The rule seems to be quite well established that in general an action upon a sealed instrument of this description must be brought by and in the name of a person who is a party to such instrument, and that a third person or a stranger to the instrument cannot maintain an action upon the same. The question presented has been the subject of frequent consideration in the courts, and I think it is established in this state that where it distinctly appears from the instrument executed that the seal affixed is the seal of the person subscribing, who designates himself as agent, and not the seal of the principal, that the former only is the real party who can maintain an action on the same. He alone enters into the covenants and is liable for any failure to fulfil, and he only can prosecute the other party. He is named in the indenture as a party, and an action will not lie on behalf of or against any person who is not a party to the instrument, or who does not lawfully represent or occupy the place of such party. It is unnecessary to review all the decisions bearing upon the question, as in a very recent case the principle discussed has been considered by this court, and the whole subject, as well as the decisions relating to the same, deliberately and carefully reviewed. See Briggs v. Partridge (64 N. Y. 357). In the case cited, an action was brought to recover purchase-money unpaid upon a contract for the sale and purchase of lands. The complaint alleged that the plaintiffs entered into an agreement in writing with one Hurlburd, who was acting under the authority of the defendants, whereby the plaintiffs sold and the defendants through Hurlburd bought a certain described piece of land, for a price named, which price the defendants, through their agent, Hurlburd, agreed to pay, as specified. The agreement was in writing, but did not show that Partridge was a principal party, and was signed and sealed by Hurlburd individually. The name of Partridge did not appear in the instrument, but the plaintiffs offered to prove that Hurlburd was acting solely for and under the direction of Partridge, who made or caused the first payment to be made as Partridge's agent or trustee in the transaction, and that his authority was oral. Proof was also offered to show that Hurlburd was constituted such agent by parol; and that the plaintiffs did not know that Partridge was the real principal. The complaint was dismissed, and it was held by this court that a contract of this description under seal could not be enforced as the simple contract of another not mentioned in or a party to the instrument, on proof that the vendee named had oral authority from such other to enter into the contract, and acted as agent in the transaction; at least, in the absence of proof of some act of ratification on the part of the undisclosed principal. The opinion of Andrews, J., in the case cited, fully covers the question now

presented; and it appears to be unnecessary to review or examine the prior cases which have a bearing upon the subject. Unless some distinction of a vital character exists between that case and the one now to be determined, the former must be regarded as decisive of the case at bar.

The claim of the learned counsel for the appellant, that as the contract in case of a lease is not required to be under seal, it may be regarded as a simple contract, upon which the principal may sue or be sued in his own name, and the seal may be rejected as surplusage, is also considered in the opinion in the case cited; and without endorsing the correctness of the cases relied upon, it is remarked that these are cases which hold this doctrine; "but the principal's interest in the contract appears upon its face, and he has received the benefit of performance by the other party, and has ratified and confirmed it by acts *in pais*." It is therefore settled law that in order to take a case out of the general rule, where the contract is one which is valid without a seal, and the seal is therefore of no account, it must appear that the contract was really made on behalf of the principal, from the instrument, and that the party derived benefit from and accepted and confirmed it by acts on his part. Within this rule it remains to be considered whether the case at bar differs from that cited. An attempted distinction is sought to be maintained, for the reason that, in the case cited, Hurlburd, the agent, did not enter into the agreement to sell as agent, while here Brown signs as agent, which it is claimed is notice of the capacity in which he contracts. This, we think, is not sufficient; and to establish any real distinction it should appear for whom he was agent, and that the parties claiming were his principals. The plaintiffs not being named in the lease, and it not appearing that they had any interest therein, there is no more ground for claiming that Brown was their agent than that he was the agent of some stranger. The use of the word agent has but little significance of itself, and as the principals are not named, cannot be regarded as applying more to one person than to another. It did not take away from Brown's obligation, because he is named as agent. The covenants are between the parties who are only named in the instrument and no other parties. Any other interpretation would be a contravention of its obvious import. As was said in the case cited: "We find no authority for the proposition that a contract under seal may be turned into the simple contract of a party not in any way appearing on its face to be a party to or interested in it, on proof dehors the instrument, that the nominal party was acting as the agent of another." To render the principal liable, where there is a contract by deed, made by an attorney or agent, it must be made in the name of the principal. (Huntington v. Knox, 7 Cush. 374, cited and approved in Briggs v. Partridge, *supra*.) It would be going very far to hold that a distinction so trifling and unimportant would authorize a disregard of the decision cited, and

presented; and it appears to be unnecessary to review or examine the prior cases which have a bearing upon the subject. Unless some distinction of a vital character exists between that case and the one now to be determined, the former must be considered as decisive of the case at bar.

The claim of the learned counsel for the appellant, that as the contract in case of a sale is not required to be under seal, it may be regarded as a simple contract, upon which the principal may sue or be sued in his own name, and the seal may be considered as surplusage, is also considered to be opposed to the decisions; but without entering into a consideration of the cases cited, it may be remarked that there are cases which hold this doctrine, that the principal's interest in the contract spoken of in the statute may be shown, although the benefit of the contract by the terms thereof has been limited and confirmed to the agent. It is therefore contended that in order to [illegible] the general rule [illegible] is one which is valid without a seal, and the seal is [illegible] agent, it must appear on the contract that he is acting [illegible] of the principal, [illegible] and that the party may benefit from and account [illegible] to him. Within this rule it remains to consider whether the case at bar differs from that [illegible] is contended, for the reason [illegible] Stanford, the agent, did not enter into the [illegible] as agent [illegible] Brown signs as agent, [illegible] of the agency to which he contracts. [illegible] and to establish any real distinction it [illegible] was agent, and that the parties claiming [illegible] plaintiffs not being named in the lease, and it not appearing that they had any interest therein, there is no more [illegible] Brown was their agent than that he was the agent [illegible] The use of the word agent has but little significance [illegible] as the principals are not named, cannot be regarded as [illegible] more to one person than to another. It did not [illegible] Brown's obligation, because he is named as agent. The [illegible] ignores the parties who are only named in the [illegible] other parties. Any other interpretation would be a [illegible] of its express terms. As was said in the case cited, [illegible] authority for the proposition that a contract under [illegible] into the simple contract of a party not in any way [illegible] or to be a party to or interested in it, on proof [illegible] agent, that the nominal party was acting as the agent [illegible] To render the principal liable, where there is a contract [illegible] made by an attorney or agent it must be made in the name of the principal. (Huntington v. Knox, 7 Cush. 374, cited and approved in Briggs v. Partridge, supra.) It would be going very far to hold that a distinction so trifling and unimportant would [illegible] a disregard of the decision cited, and

thus virtually establish a new and different principle than the one which has been settled thereby.[1] * * *

PACIFIC GUANO CO. v. HOLLEMAN.

1882. United States Circuit Court (S. D. Georgia, W. D.), 12 Fed. 61.

Action at law, upon the following note:

"$419.30

Byron, Georgia, April 23, 1875.

"On the twentieth of October, after date, I promise to pay to the order of Asher Ayres, agt., $419.30, to T. B. Goff, or at his office in Macon, Georgia; value received. If not paid at maturity, to bear interest at the rate of 12 per cent. discount per annum.

D. H. Holleman." (L. S.)

Defendant demurred to the petition, which set out a copy of the note, and which alleged that the defendant gave the same to Asher Ayres, agent of the plaintiff. Defendant also filed a plea, in the form of a plea to the jurisdiction, denying that the Pacific Guano Company had the legal title to the note, and alleging that the same was in Asher Ayres, the agent, a resident of the district in which the suit was brought. The issues thus raised were submitted to the court upon the following agreed statement of facts:

(After stating the case.)

"At the April term, 1882, of the court, the pleas to the jurisdiction (along with a demurrer to the plaintiff's writ) were submitted to the circuit and district judge, a jury being waived by consent of the parties, upon the following admitted facts: Asher Ayres, the agent named in the note sued on (and set out in the plaintiff's petition), is a resident of said western division of the southern district of Georgia. The Pacific Guano Company is a corporation having its legal domicile in the state of Massachusetts, and was the holder of the note sued on at the time of the commencement of the suit. The question argued was whether the plaintiff can maintain the action on the note, and whether parol evidence is admissible to show that the note is in fact the property of the plaintiff. (Plea of failure of consideration reserved for trial before jury.)"

Pardee, C. J.—The agreement of counsel submits to the court two questions: (1) Whether, on the agreed state of facts, the plaintiffs can maintain the action. (2) Whether parol evidence is admissible

[1] A portion of the opinion is omitted.

on the trial to show that the note is in fact the property of the plaintiff. The facts agreed on are that Ayres, the agent named in the note, is a resident of this district, and the plaintiff is the holder of the note sued on, and is a corporation domiciled in the state of Massachusetts. The other facts appear in the petition. We are agreed that both questions shall be answered in the affirmative. That a note given to Asher Ayres, agent, may be sued on by the principal, who is the owner and holder, is well settled by all the later authorities. See 12 Am. Dec. 713, 715, and authorities there cited: Daniell Neg. Inst., § 1187; Baldwin v. Bank of Newbury, 1 Wall. 234.

The authority cited by counsel for defendant in 1 Addison on Contracts, § 51, does not apply, as that section relates to equities between the parties in cases of concealed agency.

The case of Austell v. Rice, 5 Ga. 472, does not conflict, for the court in that case did not deny the right of the principal to bring the suit, but maintained the right of the payee named also to sue. To the same effect is the extract from the decision of Chief Justice Marshall in Van Ness v. Forrest, 8 Cranch 30, for the point in that case was whether the payee named could sue, and his right was maintained. The admissibility of parol evidence to show that the plaintiff is the real owner and holder of the note sued on when such ownership is put at issue by the defendant, is elementary. And in principle and authority the plaintiff may offer such evidence when in cases like this under consideration it may be held necessary for him to make such proof in order to maintain his action. See Daniell Neg. Inst., § 1187, and cases there cited.

Erskine, D. J., concurred.[1]

NATIONAL LIFE INSURANCE COMPANY v. ALLEN.

1874. Supreme Judicial Court of Massachusetts.
116 Mass. 398.

Contract upon the following promissory note, signed by the defendant:

[1] *Accord:* McConnell v. East Point Land Co., 100 Ga. 129 (*semble*).
See criticism of this case in 11 Harv. Law Rev. 340.
Contra: Grist v. Backhouse, 20 N. Car. 496; Lerned v. Johns, 9 Allen (Mass.) 419, 421 (*semble*); Van Ness v. Forrest, 8 Cranch (U. S.) 30, 34 (*semble*). In Fuller v. Hooper, 3 Gray (Mass.) 334, 341, Metcalf, J., says: "The Rule is general, if not universal, that neither the legal liability of an unnamed principal to be sued, nor his legal right to sue, on a negotiable instrument, can be shown by parol evidence. When an agent signs such an instrument without disclosing his agency on its face, the holder must look to him alone. And when such an instrument, which is intended for the benefit of the principal, is given to the agent only, he only, or his endorsee, can sue on it."
Compare Seattle Nat. Bank v. Emmons, 16 Wash. 585.

"$422.83.

Boston, May 31, 1869.

Borrowed and received of J. T. Phelps, agent, four hundred and twenty-two and eighty-three one-hundredths dollars, which I promise to pay on demand, with interest."

At the trial in the superior court, before Brigham, C. J., without a jury, the following facts were found:

The plaintiff is a corporation in the state of Vermont, having, in 1867, an office in Boston, where J. T. Phelps acted as its general agent in the business of life insurance. On December 31, 1867, the plaintiff issued to the defendant a policy of insurance on his life for $5,000 for the term of ten years, for an annual premium of $323.25. The defendant procured this policy to be issued through Phelps, and received it from him, to whom the defendant then paid the first year's premium. The note declared on was made and given to Phelps in consideration of premiums of insurance due from the defendant to the plaintiff, as provided by the policy issued to the defendant as aforesaid, and for interest on such premiums. The premiums then due, and interest, amounted on, May 31, 1869, to $422.83; and Phelps had no property or interest therein, excepting in his character of general agent of the plaintiff in Boston.

Upon these facts, the judge ruled that the plaintiff could maintain this action, and found for the plaintiff. The defendant excepted to this ruling.

Devens, J.—The note upon which this suit is brought is not in the usual form of promissory notes, but recites that, having borrowed and received the sum of $422.83 of J. T. Phelps, agent, the defendant promises to pay the same on demand, with interest. The facts found, the case having been tried by the superior court without a jury, showed that the whole consideration of this agreement moved from the plaintiff corporation, it having made a policy of insurance upon the life of the defendant, and this paper having been given by him for the balance of unpaid premiums, in which Phelps had no interest. It was a note to the possession of which the plaintiff was entitled, the whole beneficial interest being in it, and which it also had a right to collect. West Boylston Manufacturing Co. v. Searle, 15 Pick. 225, 230. But it is objected by the defendant that the note could only be collected by a suit in the name of Phelps.

As a general rule, where a written agreement not under seal is made on behalf of a principal not named, and the consideration has moved from him, it is competent for the principal to bring an action in his own name on such agreement thus made for his benefit; and, on the other hand, even when the agent may himself be liable upon a written contract, because he has failed fully to disclose that he has made it on behalf of another, the principal on whose behalf he has made it may also be liable. Huntington v. Knox, 7 Cush. 371, 374, and other cases cited in Exchange Bank v. Rice, 107 Mass. 37, 43.

The instrument here sued, although not negotiable, is properly designated as a promissory note, it being an absolute promise to pay money at all events; but, from its nature, an action upon it must necessarily be confined to those who are actually parties to it, either really or nominally, and it is clearly not intended to make any contract which was capable of transfer or assignment. On notes similar in their general character to this, it has been held that the action might be maintained in the name of the principal from whom the consideration moved. In Garland v. Reynolds, 20 Maine 45, upon a note not negotiable for $100, payable to Enoch Huntington, treasurer of the committee of surplus revenue, it was held that the town for whose money the note was given might sue in its own name.

In the present case, the principal is entitled to the benefit of the note, and the defendant can sustain no injury by suit in the name of the principal, as he would have the benefit of any payments made by him to the nominal payee, while acting as agent.

Nor do we think that the St. of 3 & 4 Anne, c. 9, § 1, upon which the modern doctrine of promissory notes is founded, which declares that the money mentioned in such note shall be construed to be due and payable to such person to whom the same is made payable, should be held to prevent the principal from maintaining an action in his own name on a note not negotiable, where the nominal promisee is an agent. Nor, even if it may be sued by the principal in his own name, does it present the case of a note payable to A. or to B., as claimed by the defendant, which has been held bad as a promissory note. Osgood v. Pearsons, 4 Gray 455. Here, there is in fact but one payee, Phelps being merely the representative of the plaintiff.

Exceptions overruled.[1]

BALDWIN v. BANK OF NEWBURY.

1863. Supreme Court of the United States. 1 Wall. 234.

The bank of Newbury, a corporation, at the time of the suit and now, established in Vermont, brought an action of assumpsit in the circuit court of the United States for the Massachusetts district against Baldwin, upon a promissory note made by him in Massachusetts, where he resided. The following is a copy of the note. It was unendorsed:

"$3,500.

Boston, Dec. 9, 1853.

Five months after date I promise to pay to the order of O. C.

[1] *Accord:* Garland v. Reynolds, 20 Me. 45.
Contra: Chaplin v. Canada, 8 Conn. 285. Compare Clark v. Reed, 20 Miss. 554.

Hale, Dec., robert, there was learned action, payable at other bank in Boston, value received. [illegible]

After making the note and payable to the bank of Massachusetts coming prior to making it, Hale obtained a certificate of the discharge from his debts, contracted to be made all contracts to be performed within the state of Massachusetts under the privilege of said laws. The bank of Newbury made no part in said proceedings in insolvency in Massachusetts by which [illegible] the discharge. This discharge he claimed to have a bar to the note.

He also pleaded the general issue, and made [illegible] had the note declared on was not [illegible] declaration, and did not execute the same as [illegible] On this point the case agreed on by the parties [illegible] viz.

It is agreed that C. C. Hale was in fact the [illegible] Bank of Newbury at the time of the making of said note, and at that time resided [illegible] and continued [illegible] and not otherwise, and not making his allegation to the court as independent, the defendant admits that said Hale continued to and was in Salem and not [illegible] at the time of and prior to the plaintiff's application. If upon the foregoing facts the plaintiff has made out a legal cause of action in his favor, and the defendant's discharge [illegible] a bar of said action the defendant is to be defaulted; otherwise the plaintiff is to become non-suit.

Two points [illegible] arose and were argued:

1. Whether the contract, being in a [illegible] to be performed in that state, was governed by the laws of Massachusetts, or by the laws of Vermont.

2. Whether, if the discharge [illegible] was a valid [illegible] to show that "C. C. Hale, Cash'r" [illegible] "Cash'r" would, as [illegible] to the note and that in fact [illegible] agent of the corporation.

The court below ruled that the [illegible] that the defendant had made [illegible] and gave judgment accordingly. The error here [illegible]

Mr. Justice Oxford, after stating the case, delivered the opinion of the court.

1. Two questions are presented by [illegible] the case is that not decided of the preceding [illegible] there given and to be determined in favour [illegible] was held in the city of Boston or at [illegible] bar to the certificate of discharge in the [illegible] because the debt was due to a citizen of another state. [illegible] the rule laid down in Ogden v. Saunders [illegible] and we also

BANK OF NEWBURY

1863. Supreme Court of the United States. 1 Wall. 234

[illegible] corporation at the time of the suit and now, established in [illegible] brought an action of assumpsit in the circuit court of the United States for the Massachusetts district against Baldwin upon a promissory note made by him in Massachusetts, where he resided, [illegible] declaring on a copy of the note. It was indorsed.

$1,250

Boston, Dec. 4, 1857.

Five months after date I promise to pay to the order of C. C.

Accord: Garland v. Jekyll, 2 Bing. 273.

Distinguished: Chaplin v. Cowdin, 7 Cush. 358. Compare Chase v. Swift, 20 Mass. 254.

Hale, Esq., cashier, thirty-five hundred dollars, payable at either bank in Boston, value received. J. W. BALDWIN."

After making the note, and pursuant to the laws of Massachusetts existing prior to making it, Baldwin obtained a certificate of discharge from his debts, embracing by its terms all contracts to be performed within the state of Massachusetts after the passage of said laws. The Bank of Newbury took no part in these proceedings in insolvency in Massachusetts by which Baldwin obtained his discharge. This discharge he pleaded in bar of the action on this note.

He also pleaded the general issue, and under that plea objected that the note declared on was not competent evidence to support the declaration, and did not sustain the cause of action therein set forth. On this point the case, as agreed on by the parties, was as follows, viz.:

"It is agreed that O. C. Hale was in fact the cashier of the Bank of Newbury at the time of the making of said note, and in case the court would admit such evidence after objection by the defendant, and not otherwise, and not waiving his objection to the same as incompetent, the defendant admits that said Hale mentioned in said note, in taking said note was acting as the cashier of and agent for the plaintiff corporation. If upon the foregoing facts the plaintiff has made out a legal cause of action in his favor, and the defendant's discharge, etc., is ineffectual as a bar of said action, the defendant is to be defaulted; otherwise the plaintiff is to become non-suit."

Two points thus arose and were argued:

1. Whether the contract, being by a citizen of Massachusetts, was discharged by the proceedings in Massachusetts, even though to be performed in that state—Hale being a citizen, and the Bank of Newbury being a corporation of Vermont, a different state.

2. Whether, if this discharge was not a bar, parol evidence was admissible to show that "O. C. Hale, Esq.," described in the note as "Cashier," simply, was cashier of the Bank of Newbury, the plaintiff in the suit, and that in taking the note, he acted as the cashier and agent of the corporation.

The court below ruled that the discharge pleaded was no bar, and also that the plaintiff had made out a cause of action, and gave judgment accordingly. On error here the same two questions arose.

Mr. Justice Clifford, after stating the case, delivered the opinion of the court:

1. Two questions are presented for decision, but the first is the same as that just decided in the preceding case, and for the reasons there given must be determined in the same way. Contrary to what was held in the case of Scribner et al. v. Fisher, 2 Gray 43, we hold that the certificate of discharge in the case was no bar to the action, because the debt was due to a citizen of another state. Such was the rule laid down in Ogden v. Saunders, 12 Wheaton 279; and we also

hold that the circumstance that the contract was to be performed in the state where the discharge was obtained does not take the case out of the operation of that rule.

2. Agreed statement also shows that O. C. Hale was in fact the cashier of the Bank of Newbury at the time the defendant executed the note, but the defendant insists, as he insisted in the court below, that parol evidence was not admissible to prove that the person therein named as payee in taking the note acted as cashier and agent of the corporation. He admits that the plaintiff can prove those facts, if admissible, but denies that parol evidence is admissible for that purpose, which is the principal question on this branch of the case. Counsel very properly admit that such evidence would be admissible in suits upon ordinary simple contracts, but the argument is that a different rule prevails where the suit is upon a promissory note or bill of exchange. Suit in such cases, it is said, can only be maintained in the name of the person therein named as payee, and consequently that the plaintiff bank cannot be treated as such without explanatory evidence, and that parol evidence is not admissible to furnish any such explanation. Suppose the rule were so, still it could not benefit the defendant in this case, because it is unconditionally admitted that O. C. Hale was in fact cashier of the plaintiff bank at the time of the making of the said note. Undeniably the note must be considered in connection with that admitted fact, and when so considered it brings the case directly within the rule laid down in the case of Commercial Bank v. French, 21 Pickering 486, and the several cases there cited upon the same subject. In that case the court say the principle is that the promise should be understood according to the intention of the parties. If in truth it be an undertaking to the corporation whether a right or a wrong name is inserted, or whether the name of the corporation or some of its officers be used, it should be declared on and treated as a promise to the corporation, and as a general rule it may be said that where enough appears to show that the parties intended to execute the instrument in the name of the principal, the form of the words is immaterial, because as between the original parties their intention should govern. But it is not necessary to place the decision upon that ground alone, as we are all of the opinion that even if the facts set forth in the agreed statement are all to be regarded merely as an offer of proof, subject to the objections of the defendant, still the case must be decided in the same way. Regarded in that point of view, the question then is whether the evidence offered was admissible. Promise, as appears by the terms of the note, was to O. C. Hale, cashier, and the question is, whether parol evidence is admissible to show that he was cashier of the plaintiff bank, and that in taking the note he acted as the cashier and agent of the corporation. Contract of the parties shows that he was cashier, and that the promise was to him in that character. Banking corporations necessarily act by some agent, and

it is a matter of common knowledge that such institutions usually have an officer known as their cashier. In general he is the officer who superintends the books and transactions of the bank under the orders of the directors.

His acts within the sphere of his duty are in behalf of the bank, and to that extent he is the agent of the corporation. Viewed in the light of these well-known facts, it is clear that evidence may be received to show that a note given to the cashier of a bank was intended as a promise to the corporation, and that such evidence has no tendency whatever to contradict the terms of the instrument. Where a check was drawn by a person who was a cashier of an incorporated bank, and it appeared doubtful upon the face of the instrument whether it was an official or private act, this court held, in the case of the Mechanics' Bank v. The Bank of Columbia, 5 Wheat. 326, that parol evidence was admissible to show that it was an official act. Signature of the promissor in that case had nothing appended to it to show that he had acted in an official character, and yet it was unhesitatingly held that parol evidence was admissible to show the real character of the transaction. Opinion in that case was given by Mr. Justice Johnson, and in disposing of the case he said, that it is by no means true, as was contended in argument, that the acts of agents derive their validity from professing on the face of them to have been done in the exercise of their agency. Rules of form, in certain cases, have been prescribed by law, and where that is so those rules must in general be followed, but in the diversified duties of a general agent, the liability of the principal depends upon the fact that the act was done in the exercise and within the limits of the powers delegated, and those powers, says the learned judge, are necessarily inquirable into by the court and jury. Maker of the note in that case had signed his name without any addition to indicate his agency, which makes the case a stronger one than the one under consideration. Same rule as applied to ordinary simple contracts has since that time been fully adopted by this court. Examples of the kind are to be found in the case of the New Jersey Steam Navigation Company v. The Merchants' Bank, 6 How. 381, and in the more recent case of Ford v. Williams, 21 How. 289, where the opinion was given by Mr. Justice Grier. In the latter case it is said that the contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein. Parol proof may be admitted to show the real nature of the transaction, and it is there held that the admission of such proof does not contradict the instrument, but only explains the transaction.

Such evidence, says Baron Park, in Higgins v. Senior, 8 Mee. & Wels. 844, does not deny that the contract binds those whom on its face it purports to bind, but shows that it also binds another by reason that the act of the agent is the act of the principal. Argument for the defendant is, that the doctrine of those cases can have no ap-

plication to the present case, because the suit is founded upon a promissory note, but the distinctions taken we think cannot be sustained under the state of facts disclosed in the agreed statement. Mr. Parsons says, if a bill or note is made payable to A. B., cashier, without any other designation, there is authority for saying that an action may be maintained upon it, either by the person therein named as payee or by the bank of which he is cashier, if the paper was actually made and received on account of the bank; and the authorities cited by the author fully sustain the position. Fairfield v. Adams, 16 Pick. 381; Shaw v. Stone, 1 Cush. 254; Barnaby v. Newcombe, 9 Cush. 46; Wright v. Boyd, 3 Barb., S. C. 523. Among the cases cited by that author to show that the suit may be maintained by the bank, is that of the Watervliet Bank v. White, 1 Den. 608, which deserves to be specially considered. Note in that case was endorsed to R. Olcott, Esq., cashier, or order, and the suit was brought in the name of the plaintiff bank, of which the indorsee was the cashier. Objection was made that the suit could not be maintained in the name of the bank, but it appearing that the endorsement was really made for the benefit of the corporation, the court overruled the objection, and gave judgment for the plaintiff. Bayley v. Onondaga Ins. Co., 6 Hill 476. Suggestion was made at the argument that the rule was different in Massachusetts, but we think not. On the contrary, the same rule is established there by repeated decisions, which have been followed in other states. Eastern R. R. Co. v. Benedict *et al.*, 5 Gray 561; Folger v. Chase, 18 Pick. 63; Hartford Bank v. Barry, 17 Mass. 94; Long v. Colburn, 11 Mass. 97; Swan v. Park, 1 Fairf. 441; Rutland & R. R. Co. v. Cole, 24 Vt. 33. Doubt cannot arise in this case that the person named in the note was in fact the cashier of the plaintiff bank, because the fact is admitted, and it is also admitted that the plaintiff can prove that in taking the note he acted as the cashier and the agent of the corporation, provided the evidence is legally admissible. Our conclusion is, that the evidence is admissible, and that the suit was properly brought in the name of the bank. The judgment of the circuit court is therefore affirmed with costs.

Judgment accordingly.[1]

[1] *Accord:* Rutland & Burlington R. R. Co. v. Cole, 24 Vt. 33; First Nat. Bank of Angelica v. Hale, 44 N. Y. 395; Garton v. Union City Nat. Bank, 34 Mich. 279.

Contra: Rose v. Laffan, 2 Spears 356 (*semble*); U. S. Bank v. Lyman, 20 Vt. (U. S. Cir. Ct. D. Vt.) 666; Horah v. Long, 20 N. Car. 416. On page 417 of Horah v. Long, Gaston, J., said: "The word 'cashier' was but descriptive of the individual to whom the note was made payable."

"Where an instrument is drawn or endorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the endorsement of the bank or corporation, or the endorsement of the officer." Negotiable Instruments Law, § 42.

1852. SUPREME COURT OF THE UNITED STATES. 57 How. 487

Opinion of the Court.

CURTIS, J.—The single question presented by this motion in this case is, whether the principal can maintain an action upon a written contract made by his agent in his own name, without disclosing the name of the principal.

It is not necessary to the validity of a contract that the names of all the parties should appear in writing. Many of the most common contracts of this description are made by correspondence, and cannot be otherwise done. If a party to such a contract, who appears by the writing to be dealing merely as agent for another, has good reason to believe that the agent deals with him as principal, he will not be allowed afterwards to charge the principal; but when he deals with the agent without any disclosure of the fact of his agency, he may elect to hold the after-discovered principal as the person with whom he contracted.

The contract of the agent is the contract of the principal, and he may sue or be sued thereon though not named therein; and notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol, it is well settled that the principal may show that the agent who made the contract in his own name was acting for him. This proof does not contradict the writing; it only explains the transaction. But the agent, who deals himself, will not be allowed to contradict the writing by proving that he was contracting only as agent, with the same evidence will be admitted to charge the principal. [Such evidence (says Story on Agency) does not deny that the contract binds those whom on its face it purports to bind, but shows that it binds another in addition.] See Higgins v. Senior, 8 Meeson and Welsby, 844.

The books of cases and treatises upon the question exhibit abundantly that this rule is settled not only in the courts of England and many of the States, but in this court. [See Kinsley v. Shaw, Stevenson Co. v. Mechanics' Bank, 6 How. 104, et seq. &c. &c.]

The judgment of the court below is therefore reversed, and a venire de novo awarded.

FORD v. WILLIAMS.

1858. Supreme Court of the United States. 21 How. 287.

Grier, J.—The single question presented for our decision in this case is, whether the principal can maintain an action on a written contract made by his agent in his own name, without disclosing the name of the principal.

It is not necessary to the validity of a contract, under the statute of frauds, that the writing disclose the principal. In the brief memoranda of these contracts usually made by brokers and factors, it is seldom done. If a party is informed that the person with whom he is dealing is merely the agent for another and prefers to deal with the agent personally on his own credit, he will not be allowed afterwards to charge the principal; but when he deals with the agent, without any disclosure of the fact of his agency, he may elect to treat the after-discovered principal as the person with whom he contracted.

The contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein; and notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol, it is well settled that the principal may show that the agent who made the contract in his own name was acting for him. This proof does not contradict the writing; it only explains the transaction. But the agent, who binds himself, will not be allowed to contradict the writing by proving that he was contracting only as agent, while the same evidence will be admitted to charge the principal. "Such evidence (says Baron Parke) does not deny that the contract binds those whom on its face it purports to bind; but shows that it also binds another, by reason that the act of the agent is the act of the principal." (See Higgins v. Senior, 9 Meeson and Wilsby, 843.)

The array of cases and treatises cited by the plaintiff's counsel shows conclusively that this question is settled, not only by the courts of England and many of the states, but by this court. (See New Jersey Steam Navigation Co. v. Merchant's Bank, 6 How. 381, et cas. ib. cit.)

The judgment of the court below is therefore reversed, and a venire *de novo* awarded.[1]

[1] *Accord:* Powell v. Wade, 109 Ala. 95.

In Propeller Tow Boat Co. v. Western Union Tel. Co., 124 Ga. 478, it was held that an undisclosed principal may recover damages from a telegraph company for loss incurred through an error in the transmission of a telegram sent for the principal by an agent in his own name.

HUNTINGTON v. KNOX.

1871. Supreme Judicial Court of Massachusetts.
7 Cush. 371.

Shaw, C. J.—This action is brought to recover the value of a quantity of hemlock bark, alleged to have been sold by the plaintiff to the defendant, at certain prices charged. The declaration was for goods sold and delivered, with the usual money counts. The case was submitted to a referee by a common rule of court, who made an award in favor of the plaintiff, subject to the opinion of the court on questions reserved, stating the facts in his report, on which the decision of those questions depends.

The facts tended to show that the bark was the property of the plaintiff; that the contract for the sale of it was made by her agent, George H. Huntington, by her authority; that it was made in writing by the agent, in his own name, not stating his agency, or naming or referring to the plaintiff, or otherwise intimating, in the written contract, that any other person than the agent was interested in the bark.

Objection was made, before the referee, to the admission of parol evidence, and to the right of the plaintiff to maintain the action in her own name. The referee decided both points in favor of the plaintiff, holding that the action could be maintained by the principal and owner of the property, subject to any set-off, or other equitable defence, which the buyer might have, if the action were brought by the agent.

The court are of opinion, that this decision was correct upon both points. Indeed they resolve themselves substantially into one; for *prima facie,* and looking only at the paper itself, the property is sold by the agent, on credit; and in the absence of all other proof, a promise of payment to the seller would be implied by law; and if that presumption of fact can be controverted, so as to raise a promise to the principal by implication, it must be by evidence aliunde, proving the agency and property in the principal.

It is now well settled by authorities, that when the property of one is sold by another, as agent, if the principal give notice to the purchaser, before payment, to pay to himself, and not to the agent, the purchaser is bound to pay the principal, subject to any equities of the purchaser against the agent.

When a contract is made by deed under seal, on technical grounds, no one but a party to the deed is liable to be sued upon it; and therefore, if made by an agent or attorney, it must be made in the name of the principal, in order that he may be a party, because otherwise he is not bound by it.

But a different rule, and a far more liberal doctrine, prevails in regard to a written contract not under seal. In the case of Higgins

HUNTINGTON v. KNOX.

(1871. Supreme Judicial Court of Massachusetts. 7 Cush. 371.)

Shaw, C. J.— This action is brought to recover the value of a quantity of bombazine, alleged to have been sold by the plaintiff to the defendant at certain prices charged. The declaration was for goods sold and delivered, and for money paid, laid out, and expended. The case was submitted to a referee by a common rule of court, who made an report in favor of the plaintiff, subject to the opinion of the court, if either party desired, stating the facts in his report, on which the decision of these questions depends.

The facts appear to show that the cloth was the property of the plaintiff, and was sold for the use of a firm made by her agent, Gardner & Huntington, by her authority; that it was made in writing by the agent, in his own name, not naming his agency or principal, but charged to the plaintiff or debtor, terminating in the ordinary manner that no other person than the agent was interested in the sale.

The question made before the referee is the admission of parol evidence to prove the right of the plaintiff to maintain the action in her own name. The referee decided such parol evidence in favor of the plaintiff, and that the action could be maintained by the principal in the name of the property, subject to any set-off, or other equitable defence which the buyer might have, if the action were brought by the agent.

The court are of opinion that this decision was correct upon both points. Indeed, upon the first, the authorities admit of no doubt. In *Paterson v. Gandasequi*, 15 East, 62, it was held, that where a factor sells goods in his own name, and on the face of the paper itself the property is sold by the factor, and in the absence of all other proof, a promise to pay the factor, the seller would be implied by law; and if that presumption of fact can be controverted so as to raise a promise to the principal by implication, it must be by evidence affirmatively proving the agency and property in the principal.

It is true that certain authorities, that when the property of one is sold by another as agent, if the principal gives notice to the purchaser before payment, or before the account is rendered to the agent, the purchaser is bound to pay the principal, and not to any equities in the principal against the agent.

Whether a contract ought to be thus construed, or to what grounds, on what but a party to the contract is liable to be sued upon it, and therefore it must be an action or account to be made in the name of the principal, as the party who has a right to be a party, because otherwise he is not bound by it.

But a different rule, and a different doctrine, prevails in regard to a written contract under seal. In the case of Higgins

v. Senior, 8 Mees. & Welsb. 834, it is laid down as a general proposition, that it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract of sale, so as to give the benefit of the contract, on the one hand to, and charge with liability on the other, the un-named principals; and this whether the agreement be or be not required to be in writing, by the statute of frauds. But the court mark the distinction broadly between such a case and a case where an agent, who has contracted in his own name, for the benefit, and by the authority of a principal, seeks to discharge himself from liability, on the ground that he contracted in the capacity of an agent. The doctrine proceeds on the ground that the principal and agent may each be bound; the agent, because by his contract and promise he has expressly bound himself; and the principal, because it was a contract made by his authority for his account. Paterson v. Gandasequi, 15 East, 62; Magee v. Atkinson, 2 Mees. & Welsb. 440; Trueman v. Loder, 11 Ad. & El. 589; Taintor v. Prendergast, 3 Hill 72; Edwards v. Golding, 20 Verm. 30. It is analogous to the ordinary case of a dormant partner. He is not named or alluded to in the contract; yet as the contract is shown in fact to be made for his benefit, and by his authority, he is liable.

So, on the other hand, where the contract is made for the benefit of one not named, though in writing, the latter may sue on the contract, jointly with others, or alone, according to the interest. Garrett v. Handley, 4 B. & C. 664; Sadler v. Leigh, 4 Campb. 195; Coppin v. Walker, 7 Taunt. 237; Story on Agency, § 410. The rights and liabilities of a principal, upon a written instrument executed by his agent, do not depend upon the fact of the agency appearing on the instrument itself, but upon the facts; 1, that the act is done in the exercise, and 2, within the limits, of the powers delegated; and these are necessarily inquirable into by evidence. Mechanics' Bank v. Bank of Columbia, 5 Wheat. 326.

And we think this doctrine is not controverted by the authority of any of the cases cited in the defendant's argument. Hastings v. Lovering, 2 Pick. 214, was a case where the suit was brought against an agent, on a contract of warranty upon a sale made in his own name. The case of the United States v. Parmele, Paine 252, was decided on the ground that, in an action on a written executory promise, none but the promisee can sue. The court admit that, on a sale of goods made by a factor, the principal may sue.

This action is not brought on any written promise made by the defendant; the receipt is a written acknowledgement, given by the plaintiff to the defendant, of part payment for the bark, and it expresses the terms upon which the sale had been made. The defendant, by accepting it, admits the sale and its terms; but the law raises the promise of payment. And this is by implication, *prima facie,* a promise to the agent; yet it is only *prima facie,* and may be

controlled by parol evidence that the contract of sale was for the sale of property belonging to the plaintiff, and sold by her authority to the defendant, by the agency of the person with whom the defendant contracted.

We are all of opinion that the provisions of Rev. Sts. C. 28, § 201, do not apply to the sale of the bark, as made in this case.

Judgment on award for the plaintiff.[1]

ELKINS v. BOSTON AND MAINE RAILROAD.

1849. SUPREME COURT OF JUDICATION OF NEW HAMPSHIRE. 19 N. H. 337.

ASSUMPSIT.—The declaration alleged that on the twenty-first of April, 1847, the defendants were common carriers of goods for hire from Andover, Mass., to Exeter; that the plaintiff delivered to them an overcoat to be carried from Andover to Exeter, and delivered to the plaintiff for a reasonable reward to be paid therefor, in consideration of which the defendants received the coat and undertook to transport and deliver it accordingly, which they have neglected and refused to do.

At the trial upon the general issue it appeared in evidence that the overcoat belonging to the plaintiff, whose name is Charles D. Elkins, was rolled up in a bundle with another overcoat, belonging to Jonathan Elkins, and a label put upon the bundle with this address upon it: "Jonathan Elkins, Exeter, N. H." The bundle was left by Jonathan Elkins in the common room of the depot at Andover, and the depot master was requested by him to send the bundle by the next passenger train to Exeter, which he said he would do.

The defendants objected that the evidence did not support the declaration, but varied materially therefrom; but the court ruled it to be sufficient.

The jury returned a verdict for the plaintiff, which the defendants moved to set aside.

GILCHRIST, C. J.—The only question in the case is whether the evidence supports the declaration. It is alleged that the plaintiff delivered to the defendants an overcoat, to be carried from Andover to Exeter, and delivered to the plaintiff. It appeared that two overcoats were rolled up in a bundle, one of which belonged to the plaintiff and the other belonged to Jonathan Elkins; that the bundle

[1] In Darrow v. Horne Produce Co., 57 Fed. 463, a written contract was executed by two agents in their own names without disclosing their principals. It was held that an action could be maintained by one undisclosed principal against the other.

was directed to Jonathan Edson, and [illegible] the depot. The only question properly raised by the case is whether upon these facts the plaintiff may maintain an action against the defendant.

In the case of Weed v. The Saratoga and Schenectady Railroad, 19 Wend. 534, cited on the counsel for the defendant, the declaration alleged that the railroad company promised for a reward to carry for the plaintiff's agent certain goods and wood and book bills, but that they carelessly lost the goods and wood. The second count alleged an undertaking in respect to the trunk and its contents. The evidence showed that the plaintiff's agent was traveling, directed his trunk to be put into the proper car on the arrival of the place of his destination he found that one of his trunks was lost containing $85 belonging to the plaintiff which he had retained for his traveling expenses. The trunk belonged to one Martin. It was held by Cowen, J., that the amount was material. "The contract as set forth, was to carry the trunk and money of the plaintiff." The proof is that the trunk belonged to Martin, a stranger, for aught it shown that the plaintiff had any connection with it. If the trunk were Barnes' (the clerk) the variance would be the same, and so I should think it he had hired or borrowed it of Martin for his own use." * * * The proof is at most of a contract with the plaintiffs to carry the money only. The declaration, then, fails in describing correctly a special executory contract, wherein great exactness is always demanded. Where the declaration is on a promise to do several things, and only one is proved, this is a variance. * * * The whole ground on the case at bar was made ostensibly with Barnes. If in legal contemplation it can be turned in favor of the plaintiffs, it must be by reason of their ownership of the articles contained in the trunk. But there can be no pretence that the trunk of a stranger, found in the book of Barnes, in which the plaintiffs had no property, or control, would be comprehended within the contract.

Thus far the decision is not so unreasonable. The question of variance was distinctly raised in the case, and although it finally turned out not to be very [illegible] the plaintiffs were permitted to amend, by striking out the count upon the declaration. But the learned judge [illegible] the question whether Barnes was the agent of the plaintiffs, and was on a journey, having himself no interest in the money, but for traveling expenses, and if so, whether it was competent for him to carry for a bailee can enure to the benefit of the bailor, although that question did not arise in the case. Upon the [illegible] several decisions worthy of consideration.

In the present case the court which is the property of the plaintiffs, being in the possession of Jonathan Edson [illegible] to receive it for the use of the plaintiffs [illegible] for what particular purpose. The plaintiffs [illegible] the possession

controlled by parol evidence that the contract of sale was for the sale of property belonging to the plaintiff, and not by the authority to the defendant by the agency of the person with whom the defendant contracted.

We are all of opinion that the provisions of Mass. Pub. St. C. 38, § 201, do not apply to the sale of the goods as made in this case.

Judgment on award for the plaintiff.

ELKINS v. BOSTON AND MAINE RAILROAD.

1859. Supreme Court of Judicature of New Hampshire. 39 N. H. 337.

[illegible] action alleged that on the twenty-first of [illegible] were common carriers of goods for hire [illegible] that the plaintiff delivered to them [illegible] from Andover to Exeter, and delivered to [illegible] a reasonable reward to be paid therefor, in consideration [illegible] defendants received the same and undertook [illegible] accordingly, which they have neglected [illegible]

[illegible] that it appeared in evidence that [illegible] the plaintiff, whose name is Charles D. [illegible] Elkins, [illegible] a bundle with another overcoat, belonging to Jonathan [illegible] tied put upon the bundle with this address upon it: [illegible] Elkins, Exeter, N. H." The bundle was left by [illegible] in the common room of the depot at Andover, and he [illegible] requested by him to send the bundle by the next [illegible] to Exeter, which he said he would do.

The defendants [illegible] that the evidence did not support the declaration, [illegible] therefrom; but the court ruled it to be sufficient.

The jury [illegible] for the plaintiff, which the defendants moved to set aside.

Question [illegible] whether the evidence supports the [illegible] that the plaintiff delivered to the [illegible] carried from Andover to Exeter, [illegible] It appeared that two overcoats were [illegible] which belonged to the plaintiff and the other [illegible] that the bundle

[illegible] plaintiff [illegible] contract was [illegible] for the benefit of [illegible] belonging [illegible] principle [illegible] that an undisclosed [illegible] principal against the [illegible]

was directed to Jonathan Elkins, and left by him at the depot. The only question properly raised by the case is whether upon these facts the plaintiff may maintain an action against the defendants.

In the case of Weed v. The Saratoga and Schenectady Railroad, 19 Wend. 534, cited by the counsel for the defendants, the declaration alleged that the railroad company promised the plaintiffs to carry for the plaintiffs a trunk containing certain goods, etc., and bank bills, but that they carelessly lost the trunk and its contents. The second count alleged an undertaking to carry the trunk and its contents. The evidence showed that the plaintiff's clerk, who was traveling, directed his baggage to be put into the proper car, but on his arrival at the place of his destination, he found that one of his trunks was lost, containing $285 belonging to the plaintiffs, which he had retained for his traveling expenses. The trunk belonged to one Martin. It was said by Cowen, J., that the variance was material. "The contract, as set forth, was to carry the trunk and money of the plaintiffs. The proof is that the trunk belonged to Martin, a stranger, nor was it shown that the plaintiffs had any connection with it. If the trunk were Barnes' (the clerk) the variance would be the same, and so I should think if he had hired or borrowed it of Martin for his own use." * * * "The proof is at most of a contract with the plaintiffs to carry the money only. The declaration, then, fails in describing correctly a special executory contract, wherein great exactness is always demanded. Where the declaration is on a promise to do several things, and only one is proved, this is a variance. * * * The whole contract in the case at bar was made ostensibly with Barnes. If in legal construction it can be turned in favor of the plaintiffs, it must be in respect to their ownership of the articles undertaken to be conveyed, and there can be no pretence that the trunk of a stranger, Martin, or the trunk of Barnes, in which the plaintiffs had leave to deposit their money, would be comprehended within the principle."

Thus far the decision is not an authority for the defendants. The question of variance was distinctly raised and decided, and although it finally turned out not to be very material, inasmuch as the plaintiffs were permitted to amend, by striking out the trunk from the declaration. But the learned judge goes farther, and after raising the question whether Barnes was not more than a mere agent, and was not a bailee, having himself an interest in the money for his traveling expenses, says, "It is doubtful, at least, whether a promise to carry for a bailee can enure to the benefit of the bailor," although that question did not arise in the case. Upon this question there are several decisions worthy of consideration.

In the present case the coat, which is the subject of this action, being in the possession of Jonathan Elkins, the latter must be regarded as the bailee, and the plaintiff as the bailor. It is immaterial for what particular purpose the plaintiff's coat was in the possession

of Jonathan Elkins. The purpose probably was that the latter might cause it to be forwarded to the plaintiff. In such a case it is clear that the bailee has such a continuing interest in the goods, until their arrival at the place of destination, as to entitle him to sue the carrier in case they are lost or damaged on their passage. Thus, in the case of Freeman v. Birch, 1 Nev. & Man. 420, which was an action against a carrier for negligence, it appeared that the plaintiff, a laundress, residing at Hammersmith, was in the habit of sending linen to and from London by the defendant's cart, which traveled from Chiswick to London. A basket of linen belonging to one Spinks was sent by the defendant's cart, and on its way to London part of its contents were either lost or stolen. Spinks did not pay the carriage of the linen. It was objected on the part of the defendant that the present action was misconceived, and that the action should have been brought by the owner of the linen. But the objection was overruled and a verdict was found for the plaintiff. A motion was made for a new trial, but refused by the court of Queen's Bench on the ground that under the circumstances the bailee retained a special property in the goods sufficient to support the action.

The property in articles bailed is for some purposes in the bailee and for some in the bailor. The right of action must partake of the same properties, and must so continue until it is finally fixed and determined by one or the other party appropriating it to himself. The decision in Freeman v. Birch, although it clearly establishes the right of a bailee to sue, does not necessarily exclude the bailor from bringing an action, if he chooses to anticipate the bailee in so doing. The rule in such cases is stated by Parke, B., to be that either the bailor or the bailee may sue, and whichever first obtains damages, it is a full satisfaction. Nichols v. Bastard, 2 Cro. Mees. & Ros. 660.

The principle appears to be well settled, that if it is not expressed that an agent contracts in behalf of another, and the name of the principal is not disclosed by him, a suit may be maintained in the name of the principal. In the present case, Jonathan Elkins was clearly the agent of the plaintiff, and the name of the plaintiff was not disclosed by him. This principle is recognized in the case of Sims v. Bond, 5 B. & Ad. 389, where Lord Denman says, "It is a well-established rule of law, that where a contract, not under seal, is made with an agent in his own name, for an undisclosed principal, either the agent or the principal may sue upon it; the defendant, in the latter case, being entitled to be placed in the same situation at the time of the disclosure of the real principal, as if the agent had been the contracting party." In the case of Higgins v. Senior, 8 Mees. & Wells 834, it was held that the suit might be maintained on the contract, either in the name of the principal or of the agent, and that, too, although required to be in writing, by the statute of frauds.

Beebe v. Robert, 12 Wend. 413; Taintor v. Prendergast, 3 Hill 72. The same principle was adopted by the supreme court of the United States, in the memorable case of the loss of the steamer Lexington, in Long Island Sound. In the case of The New Jersey Steam Navigation Co. v. The Merchants Bank, 6 Howard 344, the bank had delivered to Harnden, an express agent, a large amount of specie for transportation, by whom it was delivered to the Steam Navigation Co., who were then running the Lexington between New York and Stonington. It was held that, notwithstanding the contract of affreightment was made by Harnden with the company personally for the transportation of the specie, it was, in contemplation of law, a contract between the bank and the company, and although Harnden made the contract in his own name, and without disclosing the name of his employers at the time, the bank might maintain a suit upon the contract directly against the company. So where the plaintiff agreed with B, a common carrier, for the carriage of goods, and B, without the plaintiff's directions, agreed for the carriage with C, who, without the plaintiff's knowledge, agreed with D, a third carrier, it was held that the plaintiff might maintain an action against D, for not delivering the goods, and that by bringing the action, the plaintiff affirmed the contract made with D, by C, and could not afterwards recover from B. Sanderson v. Lamberton, 6 Binn. 129.

Upon the principles above stated, our opinion is, that the plaintiff may maintain this action.

Judgment on the verdict.[1]

GARDNER & SAGER v. ALLEN'S EXECUTOR.

1844. Supreme Court of Alabama. 6 Ala. 187.

This was an action of assumpsit, at the suit of the defendant in error against the plaintiffs. The declaration contains a number of counts, among which were several seeking to charge the defendants for the proceeds of sixty-nine bales of cotton, which they had shipped to, and caused to be sold in Liverpool for the plaintiffs' account and benefit; in addition to which, the common counts are added. The cause was tried on the pleas of non-assumpsit, payment and set-off. A verdict was returned for the plaintiffs for five hundred and ninety-eight 20-100 dollars, damages, and a judgment was rendered accordingly.

On the trial, the defendants excepted to the ruling of the judge in his charge to the jury. It was proved that the plaintiff shipped to Messrs. Labuzan & Pollard, at Mobile, sixty-nine bales of cotton.

[1] See Talcott v. Wabash Railroad Co., 159 N. Y. 461.

The latter placed the cotton in the hands of the defendants to be shipped to Liverpool, and received an advance thereon. The shipment was made accordingly, and the cotton sold in Liverpool, yielding a sum sufficient to reimburse the defendants their advance, and upwards of five hundred dollars in addition. For this excess, still remaining in their hands, this action was brought. Messrs. Labuzan & Pollard were commission merchants, and received the plaintiff's cotton for sale or shipment. The defendants proposed to show that they were ignorant of the plaintiff's right to the cotton in question; that they received it from Messrs. Labuzan & Pollard without the knowledge that it was not their property; and that the latter were indebted to them in the sum of five hundred dollars, or thereabouts. In consequence of this indebtedness, they resisted a recovery by the plaintiff. The court, on motion of the plaintiff's counsel, rejected the evidence offered by the defendants, on the ground that it was inadmissible.

COLLIER, C. J.—It has been often stated, as an acknowledged principle, if a factor sells goods in his own name, the purchaser, without a knowledge of any other person being a party to the contract, in the absence of collusion, is entitled to regard the debt as due to the factor, so as in an action brought by the principal, to set off a debt due from the factor to himself. (Paley's Agency, 326 to 35.) Mr. Justice Story, in his treatise on the Law of Agency, says, if the agent is the only known or supposed principal, the person dealing with him will be entitled to the same rights of set-off as if the agent were the true and only principal. (p. 432.) And in such case, the set-off is equally good, whether a suit be brought in the name of the principal, or of the factor or agent, for the price of the goods. (*Id.* 452; see also *id.* 417-8-9, and cases there cited.) In Mitchell v. Bristol & Powell (10 Wend. 492), the law is laid down in equivalent terms, and the court, after citing several English decisions, say, in these cases it is held, that it makes no difference whether the sale by the agent is under a *del credere* commission or not; the reason of the law is the same in both cases. But it is needless to elaborate the point at greater length. The authorities cited very fully show that it is quite immaterial whether the principal or his agent is the plaintiff. If the latter sue, the defendant may avail himself of any set-off, which he has against the former; or, if the former be the actor in the suit, the purchaser may set off a claim which he has against the latter, if he purchased under a just belief authorized by the facts of the case, that the agent was the real owner of the goods. (Story's Agency, 417-8.) And this seems to be the current or decision, both in England and the United States, without regard to the extended or restricted terms of the statutes of set-off. (Caines v. Brisban, 13 Johns. Rep. 9.) This being the law, it is clear, that the court should have permitted the defendants to show that they shipped the cotton on ac-

BAXTER AND DUNCAN v. ARMSTRONG.

1842. SUPERIOR COURT, at MONTREAL.—*Vide* 1 Q.L.R. 230.

MITCHELL, J.—One Shea was in the knowledge of the defendant, a commission merchant in Quebec, who sold, on account of the consignees, fruit and produce consigned to him by others; but at the same time, he dealt on his own account in the same kind of property. The defendant was a dealer on the same scale in the same city, in the same kind of property. The plaintiffs were engaged in the fruit and produce business at Nauvoo, Ill., and had for years been in the habit of shipping such property to Shea at Quebec, agreed to be by him sold on their account, and to remit to them the proceeds less his commission. [*See the previous report.*] In August, 1841, they shipped to him a consignment of fruit. Shea sold the fruit to the defendant on August 21st. There was no express agreement between Shea and the defendant for any credit, but the purchase price was not paid at the time of the delivery of the fruit. In addition of those in the trade at Quebec being to sell [illegible] the defendant had a settlement, at which the credit of the purchase price was applied upon or offset against [illegible] from Shea to the defendant, [illegible] The defendant had no sort of connection with Shea's business. On the 24th August, 1841, Shea [illegible] for the benefit of his creditors. [illegible] for the proceeds of their fruit [illegible] for the same object by applying [illegible]

[illegible]

count of Messrs. Labuzan & Pollard, under such circumstances as might well induce them to believe that it was their property. The sufficiency of this evidence was a question of fact to be considered by the jury, under the direction of the court; but being admissible, its rejection is an error, for which the judgment is reversed, and the cause remanded.[1]

BAXTER and Others v. SHERMAN.

1898. Supreme Court of Minnesota. 73 Minn. 434.

Mitchell, J.—One Shea was, to the knowledge of the defendant, a commission merchant or factor, who sold, on account of the consignors, fruit and produce consigned to him by others; but, at the same time, he dealt on his own account in the same kind of property. The defendant was a dealer on his own account in the same city, in the same kind of property. The plaintiffs were engaged in the fruit and produce business at Nauvoo, Ill., and had for years been in the habit of shipping such property to Shea as their agent, to be by him sold on their account, and to remit to them the proceeds, less his commissions. For this purpose, in August, 1896, they shipped to him a consignment of fruit. Shea sold the fruit to the defendant on August 21st. There was no express agreement between Shea and the defendant for any credit, but the purchase price was not paid at the time of the delivery of the fruit, the custom of those in the trade in Minneapolis being to settle accounts between themselves once a week. On August 22, Shea and defendant had a settlement, in which the price of the plaintiff's fruit was applied upon or offset against an individual debt due from Shea to the defendant, contracted on August 18th or 19th. This debt had no sort of connection with the sale of plaintiff's fruit. On August 26th, Shea, being insolvent, made an assignment for the benefit of his creditors. He has never accounted to the plaintiffs for the proceeds of their fruit, and defendant has never paid for the same unless by applying the price, as above stated, upon

[1] *Accord:* Ruan v. Gunn, 77 Ga. 53.

"It is familiar law that when a principal entrusts the possession of his goods with an agent, and one deals with the agent as the principal, without knowledge of the agency, he may set off any claim he has against the agent before he is undeceived in answer to the demand of the principal. The doctrine rests upon the ground that the principal who has permitted an agent to deal with his goods as his own must not only take the contract as the agent made it, but is virtually estopped from alleging that the agent is not the real plaintiff in his (the principal's) suit. The set-off must be pleaded just as if the suit were in the name of the apparent owner at the time of the sale, that is, the agent." Cockrill, C. J., in Quinn v. Sewell, 50 Ark. 380, 383.

See Sellers & Co. v. Malone-Pilcher Co., 151 Ala. 426.

the debt which Shea owed him. Plaintiffs brought this action to recover the price of the fruit. As factors or commission merchants may sell in their own name the goods of their principals, we shall assume, although there is no express finding to that effect that Shea sold this fruit without disclosing the name of his principal or stating whether this property belonged to himself or to another. The evidence, as well as the finding, is to the effect that defendant knew that, while Shea sold fruit and produce on his own account, he was also engaged in the business of selling it as factor or agent for others who consigned it to him for sale on their account. Therefore, under the circumstances, a sale by Shea in his own name to the defendant was not the equivalent of a statement that he was selling on his own account. On the contrary, it amounted only to an assurance that the fruit was either his own property or the property of some principal who had employed him to sell. With this knowledge of the equivocal relation of Shea to the property, and with actual knowledge that it had been shipped to Shea by somebody (for defendant himself took the fruit out of the car in which it had been transported from Nauvoo, and paid the railroad freight), the defendant, so far as appears, made no inquiry whatever of Shea or anyone else as to whose property it was, or whether Shea was acting for himself or for a principal.

The court found that defendant had no knowledge or information of any claims of plaintiffs in or to the property until after the settlement with Shea. This may be, and probably is, technically and literally supported by the evidence, but, as will be seen hereafter, is wholly insufficient to entitle the defendant to offset his debt against Shea against plaintiffs' demand for the price of their property. It is not important that the purchaser from a factor did not know who the principal was if he knows, or is chargeable with notice, that the property belongs to a principal, and not to the factor. It is well settled by an almost unbroken line of authorities, from George v. Claggett, 7 Term R. 359, down, that if the owner of goods intrusts them to an agent with authority to sell in his own name, without disclosing the name of his principal, and the agent sells in his own name to one who knows nothing of any principal, but honestly believes that the agent is selling on his own account, he may set off any demand he may have on the agent against the demand for the goods made by the principal. This set-off need not exist at the time of the sale. It is sufficient if it arises before notice of the real ownership of the goods. As applied to factors, this rule might seem at first to be inconsistent with the equally well-settled doctrine, so much relied on by the plaintiff, that a factor or commission merchant has no power to pledge his principal's goods for his own benefit; that such an act is tortious and void as against the principal; and that, too, without regard to the pledgee's ignorance of the fact that the factor was not the real owner of the property.

See Wright v. Solomon, 19 Cal. 64. But both rules are equally well settled; and we apprehend that the distinguishing feature between the two is that a sale of the principal's goods in the name of the factor is within the implied actual authority of the latter, while a pledge is not. The rule referred to in the case of sale rests upon the doctrine of equitable estoppel, and is merely an application of the familiar principle that, where one of two innocent persons must suffer by the fraud of a third, the loss should fall upon him whose act or negligence enabled the third person to commit the fraud. But this rule should not be extended beyond the reason or principle upon which it is founded. It was never intended to be used as a shield so as to make every right of the real owner subordinate to the right of a third party, dealing with the agent, to gain every possible advantage of the transaction. Hence, where an agent sells in his own name for an undisclosed principal, and the principal sues the buyer for the price, the buyer cannot set off a debt due from the agent unless in making the purchase he was induced by the conduct of the principal to believe, and did in fact believe, that the agent was selling on his own account. The rule of George v. Clagett, does not obtain where the purchaser knows that the agent is not the owner of the goods or when circumstances are brought to his knowledge which ought to have put him upon inquiry, and by investigating which he would have ascertained that the agent was not the owner. Where the character of the selling is equivocal, as in this case, and, as was known to the defendant, Shea was in the habit of selling sometimes on his own account, and sometimes as an agent, it was incumbent on defendant, if he desired to avail himself of a set-off, to inquire in what character Shea was acting in that particular transaction, and if he chose to make no inquiry, and it turned out, as it did, that he bought of an undisclosed principal, he ought not to be allowed the benefit of any set-off.

Defendant had sufficient information to advise him that it was quite as likely that Shea was acting as factor as that he was acting for himself. This was of itself enough to put him upon inquiry, not as to Shea's authority to sell, but as to his own right of set-off if he desired to buy with a view of covering his own debt or availing himself of a set-off. Presumably, if he had inquired of Shea, he would have been informed that Shea was acting merely as an agent for another. Should Shea have refused to inform him whether he was acting for himself or for a principal, defendant could have declined to make the purchase. Knowing what he did, and having entered into the transaction without inquiry, defendant could have had no honest or reasonable belief one way or the other as to the ownership of the property; and under these circumstances he can have no right, as against the demand of the plaintiffs, to insist on a set-off or upon the attempted application of the purchase price of their fruit on his claim against Shea. Without attempting

to cite or review the authorities on this subject, we merely refer to the notes to George v. Clagett, 2 Smith, Lead Cas. 1359, where most of the authorities, both American and English, are referred to; and to Cooke v. Eshelby, L. R. 12 App. Cas. 271, where the subject is fully discussed and all the English cases reviewed. Our conclusion is that the findings of fact were not sufficient to justify the conclusions of law, and that the evidence would not have justified any findings which would have entitled the defendant to prevail. 2. The defendant was permitted, under the objection and exception of the plaintiffs, to introduce evidence of a local custom in Minneapolis among those engaged in the fruit and produce business, such as Shea and defendant were engaged in, of running weekly accounts on cash sales, instead of paying spot cash on each transaction, and then making weekly payments and settlements, in which they allowed and offset against each other all bills accruing during the past week, and, in short, having a sort of weekly clearance between themselves, in which they balanced and offset all outstanding bills between themselves, without regard to whether such bills were due to or from them as factors or principals. This evidence was clearly immaterial and incompetent for any purpose. This so-called "custom" was an arrangement among the local dealers solely for their own convenience, which they acted on entirely in reliance upon the financial responsibility of each other. If, in the absence of any such custom, defendant would have no right to apply the price of plaintiff's fruit on the individual debt of Shea, the custom could give him no such right; for the effect of such a custom would be to permit an agent to appropriate his principal's property to the payment of his own debt, which would be contrary to well-established principles of law as well as good morals. Therefore such custom would be void. Moreover, no evidence was introduced or offered that plaintiffs had any knowledge of the alleged custom; and nothing is better settled than that a local custom, even if valid, is operative only in respect to those who are shown to have knowledge of it; and there can be no presumption that a stranger living in Illinois had any knowledge of a local custom in Minneapolis. It is doubtless true that, where the owner of property consigns it for sale to a factor, it is within the implied or apparent authority of the factor to conform to any general and uniform custom of the place to which the property is consigned as to the terms or conditions of sale, whether the consignor knew of the custom or not; but the custom here sought to be proved does not come within any such principle. Order reversed, and a new trial granted.[1]

[1] *Accord:* Miller v. Lea, 35 Md. 396; Frazier v. Poindexter, 78 Ark. 241.

"There can be no doubt of the correctness of the proposition, that where one deals with an agent, knowing of the agency, he cannot set off a claim due

LUMLEY v. GYE.

1853. Supreme Court of Judicature. 22 L.J. Q.B.

It was shown on the trial that [illegible] the case [illegible] delivery of the ale by Broadhurst & Co., and [illegible] that Broadhurst & Co., in [illegible] under that style [illegible] having a stock of goods [illegible] ale; and that the defendant had [illegible] him from time to time, [illegible] of May, 1850, Broadhurst [illegible] casks of ale; that Broadhurst [illegible] to defendant an order [illegible] the 9th, 1850, Mr. Griffins, [illegible] heads of Bass ale, ex Rapid (Signed) George Lumley. Broadhurst, on the third of May, 1850, presented an bill for the ale to the defendant and was paid; that after such payment and after Broadhurst had absconded the plaintiff called at defendant's place of business and told his clerk to tell defendant not to pay Broadhurst, which was the first time the defendant knew plaintiff claimed the ale. Defendant had judgment. Plaintiff appeals.

Cave, J., delivered the opinion of the court.—[illegible] for consideration.

This is an action to recover the value of certain ale purchased by the defendant of Broadhurst & Co., wine-dealers in Soho Square. It appears that the ale belonged to the plaintiff, and was delivered upon his order; but to which [illegible] Broadhurst & Co. [illegible] on their own account. The defendant had no knowledge of any other person in connection with the transaction [illegible] informed of the interest of the plaintiff [illegible] and paid for it. The plaintiff [illegible] agreed by him for its delivery was [illegible] notice of his rights; but the [illegible] by Broadhurst & Co., and delivered [illegible] of their contract. The [illegible] procured by a person [illegible] or, in other words, that they had [illegible] of him for the necessary [illegible] defendant could not have [illegible] dealing with, in the ordinary [illegible] of the opinion that the payment [illegible] to discharge whatever liability [illegible] to no other light than that of agents [illegible] contracting in their own names, and [illegible] [illegible] Judgment [illegible]

LUMLEY v. CORBETT.

1861. Supreme Court of California. 18 Cal. 494.

It was shown on the trial that at the time of the sale and delivery of the ale by Broadhurst & Co., and for some time anterior thereto Broadhurst & Co., or rather Broadhurst, doing business under that style, was a jobber in Front street, in San Francisco, having a stock of goods in his store among which were casks of ale; and that the defendant had been in the habit of buying from him from time to time, and paying him therefor; that on the second of May, 1859, Broadhurst bargained and sold to defendant five casks of ale; that Broadhurst procured from plaintiff and gave to defendant an order for the delivery of the ale, as follows: "May the 2d, 1859, Mr. Griffing, please deliver to Mr. Corbett five hogsheads of Bass ale, ex Rapid. (Signed) George Lumley; "that Broadhurst, on the third of May, 1859, presented his bill for the ale to the defendant and was paid; that after such payment and after Broadhurst had absconded, the plaintiff called at defendant's place of business and told his clerk to tell defendant not to pay Broadhurst, which was the first time the defendant knew plaintiff claimed the ale. Defendant had judgment. Plaintiff appeals.

Cope, J., delivered the opinion of the court.—Baldwin, J., concurring.

This is an action to recover the value of certain ale purchased by the defendant of Broadhurst & Co., merchants in San Francisco. It appears that this ale belonged to the plaintiff, and was delivered upon his order; but in selling it, Broadhurst & Co. professed to act on their own account. The defendant had no knowledge of any other person in connection with the transaction, and was not informed of the interest of the plaintiff until he had received the ale and paid for it. The plaintiff seems to think that the order signed by him for its delivery was sufficient to put the defendant upon notice of his rights; but the answer is that the order was procured by Broadhurst & Co., and delivered to the defendant in fulfillment of their contract. The inference could only have been, that it was procured by a personal arrangement between them and the plaintiff; or, in other words, that they had purchased or otherwise obtained of him the ale necessary to meet their engagement with the defendant. The defendant could not have supposed that he was contracting with, or incurring any liability to the plaintiff, and we are of the opinion that the payment to Broadhurst & Co. was sufficient to discharge whatever liability he incurred. We can regard the case in no other light than that of agents of an undisclosed principal contracting in their own names; and it is well settled that in such

him from the agent against the debt due the principal." Baker, J., in Reutchler v. Hucke, 3 Ill. App. 144, 149.

cases, agents employed to sell may also receive payment. If, says Story, the payment is received by the agent, and the debtor has no notice of any claim by the principal, the latter will be bound thereby. (Story on Agency, § 430.) "Until the principal appears," said Lord Ellenborough, in Blackburn v. Scholes, (2 Camp. 343) "the agent is to be regarded as the proprietor." There is no doubt that the law upon this subject is adverse to the right of the plaintiff to recover. But even if Broadhurst & Co. had acted expressly in the capacity of agents, we are satisfied that the payment to them would have discharged the debt. The circumstances would have been sufficient to establish their authority to receive it; and it is only in the absence of circumstances justifying it that such authority could not be inferred. The payment was made in the regular course of business, and the subsequent notification to the defendant to withhold it seems to recognize their authority to receive it.

Judgment affirmed.[1]

Section 2.—Liability of Principal to Third Party.

BRIGGS ET AL. V. PARTRIDGE ET AL.

1876. COURT OF APPEALS OF NEW YORK. 64 N. Y. 357.

APPEAL from judgment of the general term of the superior court of the city of New York affirming a judgment in favor of defendants, entered upon an order dismissing plaintiffs' complaint on trial. (Reported below, 7 J. & S. 339.)

This action was brought to recover the purchase-money unpaid under a contract for the purchase and sale of lands.

The complaint alleged that the plaintiffs entered into an agreement in writing with one L. P. Hurlburd, who was acting for and under the authority of the defendants, "whereby these plaintiffs sold and the defendants through said Hurlburd bought" a certain described piece of land, "for the sum of $7,200, which said sum the defendants, through their agent, the said Hurlburd, agreed to pay," as specified. That it was further agreed that the plaintiffs should deliver the deed, and that the defendants should accept the same and pay the balance of the purchase-money unpaid on the 1st day of February, 1874; that the defendants, through said Hurlburd, paid on the delivery of the agreement $100; that on the said 1st day of February, 1874, the plaintiffs were "ready to carry out on their

[1] *Accord:* Saladin v. Mitchell, 45 Ill. 79; Traub v. Milliken, 57 Me. 63. Regarding the right of one, who has contracted with the agent of an undisclosed principal, to set up a discharge under a state insolvency law as a bar to an action brought by such principal see Ilsley v. Merriam, 7 Cush. (Mass.) 242.

part the agreement aforesaid by executing and delivering to said Hurlburd, for and on account of said defendants, a good and sufficient deed of the premises hereinbefore described." Whereas the defendants wholly failed on their part to fulfill said agreement or to take title to said property, but on the contrary refused, and they have ever since refused so to do, and the plaintiffs demanded judgment that the defendants perform said agreement and pay to plaintiffs the sum agreed. The answer was a general denial.

Plaintiffs' counsel, in opening the case on the trial, said that the agreement on which the plaintiffs relied was in writing; that it was made by the plaintiffs as vendors, and Llewellyn P. Hurlburd as vendee; that the written instrument did not show but that Hurlburd was a principal party; that it was signed and sealed by Hurlburd individually; that the name of defendant Partridge did not appear in the instrument, but that plaintiffs would prove that the said Hurlburd was acting solely for and under the direction of Thomas M. Partridge, who paid or caused to be paid the first payment under the contract; that said Hurlburd was the agent and trustee of said Partridge in the transaction, and the authority given by Partridge to Hurlburd was oral.

On this opening and on the complaint the defendants' counsel moved to dismiss the complaint on the grounds: First. That the facts stated in the opening and by the complaint did not constitute a cause of action. Second. That it was not competent to vary the terms of the written contract by parol proof that the party who executed the same as principal was not a principal, but an agent.

The plaintiffs' counsel further offered to prove that Hurlburd was constituted by parol agent to enter into and execute the contract in behalf of the defendant Partridge; that at the time the contract was made the plaintiffs did not know that Partridge was the real principal; that the plaintiffs tendered a deed to Hurlburd, and did not at that time know that Partridge was the real principal.

The motion was thereupon granted, and plaintiffs' counsel duly excepted.

Andrews, J.—The defendant was not a party to the agreement for the sale and purchase of the land. He did not sign it himself, nor did it purport to have been executed for him by Hurlburd. His name does not appear in it, and there is nothing upon the face of the agreement to indicate that he was in any way connected with or interested in the purchase. The covenants in the agreement are solely between the plaintiff and Hurlburd. The former covenants to sell and convey the land to Hurlburd, and Hurlburd covenants to purchase and to pay the purchase-money as stipulated. The defendant took no part in the negotiation of the agreement, and the plaintiff, when he made and executed it, had no knowledge that Hurlburd was acting as the agent of the defendant. The agreement was under seal, each party affixing his own seal to the in-

strument. Hurlburd, the apparent purchaser, was in fact acting in the transaction as the agent of the defendant, his undisclosed principal, under an oral authority to enter into the contract in his behalf, and the defendant furnished the money to make the down payment to the broker who negotiated the sale. This action is brought by plaintiff upon the agreement to recover the unpaid purchase-money, and it is sought to enforce it against the defendant as the real purchaser and party, upon the ground that Hurlburd, the nominal purchaser, was acting for him and by his authority in the transaction. The real question is, Can the vendor, in a sealed executory agreement, *inter partes,* for the sale of land, enforce it as the simple contract of a person not mentioned in or a party to the instrument, on proof that the vendee named therein, and who signed and sealed it as his contract, had oral authority from such third person to enter into the contract of purchase, and acted as his agent in the transaction, and can the vendor on this proof, there having been no default on his part, and he being ready and willing to convey, recover of such third person the unpaid purchase-money? This question here arises in a case where the vendor, so far as it appears, has remained in possession of the land, and where no act of ratification of the contract by the undisclosed principal has been shown. It is not disputed, and indeed it cannot be, that Hurlburd is bound to the plaintiff as covenantor, upon the covenants in the agreement. He covenants for himself and not for another, to pay the purchase-money, and by his own seal fixes the character of the obligation as a specialty. He is liable to perform the contract irrespective of the fact whether it can be enforced against his nominal principal. On the other hand it is equally clear that Hurlburd's covenant cannot be treated as, or made the covenant of the defendant. Those persons only can be sued on an indenture who are named as parties to it, and an action will not lie against one person on a covenant which purports to have been made by another. (Beckham v. Drake, 9 M. & W. 79; Spencer v. Field, 10 Wend. 88; Townsend v. Hubbard, 4 Hill 351.)

In the case last cited, it was held that where an agent duly authorized to enter into a sealed contract for the sale of the land of his principals, had entered into a contract under his own name and seal, intending to execute the authority conferred upon him, the principals could not treat the covenants made by the agent as theirs, although it clearly appeared in the body of the contract that the stipulations were intended to be between the principals and purchasers, and not between the vendees and the agent. The plaintiffs in that case were the owners of the land embraced in the contract, and brought their action in covenant to enforce the covenant of the vendees to pay the purchase-money, and the court decided that there was no reciprocal covenant on the part of the vendors to sell, and that for want of mutuality in the agreement the action

could not be maintained. It is clear, that unless the plaintiff can pass by the persons with whom he contracted, and treat the contract as the simple contract of the defendant, for whom it now appears that Hurlburd was acting, this action must fail. The plaintiff invokes in his behalf the doctrine that must now be deemed to be the settled law of this court, and which is supported by high authority elsewhere, that a principal may be charged upon a written parol executory contract entered into by an agent in his own name, within his authority, although the name of the principal does not appear in the instrument, and was not disclosed, and the party dealing with the agent supposed that he was acting for himself, and this doctrine obtains as well in respect to contracts which are required to be in writing, as to those where a writing is not essential to their validity. (Higgins v. Senior, 8 M. & W. 834; Trueman v. Loder, 11 Ad. & Ellis 594; Dykers v. Townsend, 24 N. Y. 61; Coleman v. First Nat. Bank of Elmira, 53 N. Y. 393; Ford v. Williams, 21 How. 289; Huntington v. Knox, 7 Cush. 371; The Eastern R. R. Co. v. Benedict, 5 Gray 566; Hubbert v. Borden, 6 Wharton 91; Browning v. Provincial Ins. Co., 5 L. R. [P. C.] 263; Calder v. Dobell, 6 L. R. [C. P.] 486; Story on Agency, §§ 148, 160.

It is, doubtless, somewhat difficult to reconcile the doctrine here stated with the rule that parol evidence is inadmissible to change, enlarge or vary a written contract, and the argument upon which it is supported savors of subtlety and refinement. In some of the earlier cases the doctrine that a written contract of the agent could be enforced against the principal was stated with the qualification, that it applied when it could be collected from the whole instrument, that the intention was to bind the principal. But it will appear from an examination of the cases cited, that this qualification is no longer regarded as an essential part of the doctrine. Whatever ground there may have been originally to question the legal soundness of the doctrine referred to, it is now too firmly established to be overthrown, and I am of opinion, that the practical effect of the rule as now declared is to promote justice and fair dealing. There is a well recognized exception to the rule in the case of notes and bills of exchange, resting upon the law merchant. Persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them; and a person not a party cannot be charged upon proof that the ostensible party signed or indorsed as his agent. (Barker v. Mechanics' Ins. Co., 3 Wend. 94; Pentz v. Stanton, 10 *id.* 271; De Witt v. Walton, 9 N. Y. 571; Stackpole v. Arnold, 11 Mass. 27; Eastern R. R. Co. v. Benedict, 5 Gray 566; Beckham v. Drake, 9 M. & W. 79.) That Hurlburd had oral authority from the defendant to enter into a contract for the purchase of the land, and that he was acting for the defendant in making it is admitted; and if the contract had been

a simple contract and not a specialty the defendant would, I think, have been bound by it within the authorities cited. No question would arise under the statute of frauds, for the statute prescribing what shall be necessary to make a valid contract for the sale of lands requires only that the contract, or some note or memorandum thereof expressing the consideration, should be in writing and subscribed by the party by whom the sale is to be made, or his agent lawfully authorized. (2 R. S. 135, §§ 8, 9.) In this case the contract was signed by the vendors; and even if it had been executed on their part by an agent pursuant to an oral authority, it would have been a valid execution within the statute. (Lawrence v. Taylor, 5 Hill 113; Worrall v. Munn, 1 Seld. 229.) But the vendee's contract need not be in writing. (McCrea v. Purmort, 16 Wend. 469.)

We return, then, to the question originally stated. Can a contract under seal, made by an agent in his own name for the purchase of land, be enforced as the simple contract of the real principal when he shall be discovered? No authority for this broad proposition has been cited. There are cases which hold that when a sealed contract has been executed in such form, that it is, in law, the contract of the agent and not of the principal, but the principal's interest in the contract appears upon its face and he has received the benefit of the performance by the other party and has ratified and confirmed it by acts *in pais*, and the contract is one which would have been valid without a seal, the principal may be made liable in assumpsit upon the promise contained in the instrument, which may be resorted to to ascertain the terms of the agreement. (Randall v. Van Vechten, 19 J. R. 60; Du Bois v. The Del. and Hud. Canal Co., 4 Wend. 285; Lawrence v. Taylor, 5 Hill 107; see also, Evans v. Wells, 22 Wend. 324; Worrall v. Munn, *supra;* Story on Agency, § 277; 1 Am. Lead. Cas. 735, note.)

The plaintiff's agreement in this case was with Hurlburd and not with the defendant. The plaintiff has recourse against Hurlburd on his covenant, which was the only remedy which he contemplated when the agreement was made. No ratification of the contract by the defendant is shown. To change it from a specialty to a simple contract, in order to charge the defendant, is to make a different contract from the one the parties intended. A seal has lost most of its former significance, but the distinction between specialties and simple contracts is not obliterated. A seal is still evidence, though not conclusive, of a consideration. The rule of limitation in respect to the two classes of obligations is not the same. We find no authority for the proposition that a contract under seal may be turned into the simple contract of a person not in any way appearing on its face to be a party to or interested in it, on proof *de hors* the instrument, that the nominal party was acting as the agent of another, and especially in the absence of any proof that

the alleged principal has received any benefit from it, or has in any way ratified it, and we do not feel at liberty to extend the doctrine applied to simple contracts executed by an agent for an unnamed principal so as to embrace this case. The general rule is declared by Shaw, Ch. J., in Huntington v. Knox (7 Cush. 374): "Where a contract is made by deed, under seal on technical grounds, no one but a party to the deed is liable to be sued upon it, and therefore if made by an attorney or agent it must be made in the name of the principal in order that he may be a party, because otherwise he is not bound by it."

The judgment of the general term should be affirmed.

All concur.

Judgment affirmed.[1]

BROWN v. PARKER.

1863. Supreme Judicial Court of Massachusetts. 7 Allen 337.

Contract upon an account, and two promissory notes payable to the plaintiff or order, signed "N. H. Streeter." The declaration alleged that the defendant carried on the business of keeping a livery stable under the name and style of N. H. Streeter, employing said Streeter as his agent to manage the business, and that he, by said Streeter, made each of the notes.

At the trial in the superior court, before James, J., it appeared that the notes were given for carriages sold by the plaintiff and delivered at the stable; and the plaintiff testified that he sold them, believing the defendant to be interested in the stable as owner or partner, and knowing that he was of sufficient ability to pay, and that Streeter was insolvent. There was evidence that the defendant admitted to another witness that he was interested in the stable and owned the stock; whereupon the witness asked, "Are you holden on my demands? I have taken Streeter's notes;" to which the defendant replied, "Yes, they will be paid. I own the stock." Streeter had the general management of the business at the stable, under a power of attorney from the defendant which contained the following language:

"Now said Parker hereby makes said Streeter his agent to manage said stable stock as a let stable, and gives him full authority to carry on said stable business and to make any purchase that may be necessary therefor, the said Streeter keeping regular accounts open at all times to the inspection of said Parker, and accounting to said Parker once a quarter, beginning with April 1, 1858; for

[1] *Accord:* Jones v. Morris, 61 Ala. 518. Compare Moore v. Granby Mining, etc., Co., 80 Mo. 86.

which said services as agent said Parker is to allow said Streeter the sum of three hundred and seventy-five dollars per quarter, and five per cent. commissions on the net profits of said business."

The plaintiff also offered to prove, by parol evidence, "that the defendant admitted Streeter's agency, and his authority to sign these notes for him;" but the judge ruled that, under the circumstances, parol evidence was not admissible for the purpose of showing that Streeter signed these notes as agent of the defendant, or that the defendant was bound by his signature.

The defendant thereupon was allowed to file, against the plaintiff's objection, a written paper, consenting to a verdict against him for the amount of the account; and a verdict was accordingly returned for that amount only. The plaintiff alleged exceptions.

Bigelow, C. J.—There can be no doubt that, on well-settled principles, persons or corporations may be held liable on contracts, express or implied, negotiable or otherwise, entered into and executed under a name or style different from that which usually and properly belongs to them, and in which their own proper names or signatures do not appear at all. But such liability exists only where it is affirmatively and satisfactorily proved that the name or signature thus used is one which has been assumed and sanctioned as indicative of their contracts, and has been with their knowledge and consent adopted as a substitute for their own names and signatures in signing notes or executing other written contracts. In such cases, the adopted name is in law equivalent to the actual name of the party. Melledge v. Boston Iron Co., 5 Cush. 158, 173. But the evidence in this case failed to show that the defendant ever recognized the name affixed to the notes declared on as equivalent to his signature, or in any way authorized any contract to be signed by a name other than or different from his own. Nor was there a foundation laid by the proof of facts from which any such inference could be drawn. On the contrary, the agreement or power of attorney produced by the plaintiff in support of his case, and by virtue of which it is alleged that the defendant is liable for the notes, is a mere contract of agency, which not only does not contain any stipulation by which the business is to be carried on or contracts are to be made in the name of the agent as a substitute for that of the defendant, but does not even confer on the agent any authority to give negotiable promissory notes in the name of the principal or otherwise for the purpose of transacting the business of the agency. Without express authority he could not properly sign notes in the name of the principal. An agent employed to make purchases cannot give negotiable paper on which his principal will be liable. Taber v. Cannon, 8 Met. 456; Webber v. Williams College, 23 Pick. 302. Nor did the other evidence offered by the plaintiff sustain the proposition that the name of the agent was by sanction or adoption or usage a substitute for that of the principal. Taken in its

[illegible] power and going on it and [illegible] effect of which it is reasonably susceptible, it only raises a verbal question of agency and of an authority to the agent to sign the notes in such form. But the difficulty with the case is that the agent did not execute this authority. He did not sign the notes for the defendant, but he signed his own name to them. The proposal and acceptance were that the defendant should be responsible for the signature of the agent to be his, or that it was used in lieu thereof, or as a substitute therefor.

As the case stood, therefore, on the evidence, it was the note of the agent only. Parol evidence was improperly received to show that it was given in the course of the dealings of, or on account of the business of, the principal. Such evidence would have been competent in an action brought on a written trade contract not negotiable. Higginson v. Knox, 7 Cush. 571. But in suits on promissory notes or bills of exchange, nevertheless, it is admissible to charge the person of principal whose name is not in some way disclosed on the face of the note or draft. This point has been often decided in this commonwealth, and the reasons on which the rule rests have been reiterated in very recent decisions. Thayer v. Luring, 5 Allen, 500, and cases cited.

We do not see how the plaintiff was aggrieved by the ruling of the court allowing the defendant to file the written paper relating to a verdict on the count for labor and services. The plaintiff had a verdict for all that he could legally claim, and he could not rightfully save the fact that the defendant was willing to be held responsible for the account in the account as evidence of the value of it on the notes. Exceptions overruled.

KAYTON et al. v. HAVENER et al.

1890. Court of Appeals of New York. 119 N. Y. 652.

Appeal from judgment of the general term of the superior court of the city of New York [illegible] order made December 2, 1889, which denied a motion for a new trial and directed judgment in favor of defendant, entered upon an order overruling plaintiff's motion for a new trial.

The oral discussion regarding the validity of an instrument signed as a negotiable instrument in Stevens v. Pierce, 1 Pick. 269, 11 Am. Dec. 171; Shaw v. Pioneer Mining Co., 99 Cal. 279, a promissory note was executed "on account of sales," etc., and was signed "Pioneer Mining Company, by P. Keane, Supt." It was held that, as the note was ambiguous, parol evidence was admissible to show that it was the note of the company.

See Van Dyke v. Van Dyke, 101 Cal. 260.

See discussion of Gardner Co. v. Howard, 147 Mo. 287, 48 S. W. Rep. 1102, 43 L. R. A. 66.

broadest aspect, and giving to it the fullest effect of which it is reasonably susceptible, it only shows a verbal admission of agency, and of an authority by the agent to sign the notes in suit for him. But the difficulty with this part of the case is, that the agent did not execute this authority. He did not sign the notes for the defendant, but he affixed his own name to them. The plaintiff did not offer to show that the defendant admitted the signature of the agent to be his, or that it was used in lieu thereof, or as a substitute therefor.

As the case stood, therefore, on the evidence, it was the note of the agent only. Parol evidence was inadmissible to show that it was given in the course of the agency, or on account of the business of the principal. Such evidence would have been competent in an action brought on a written simple contract, not negotiable. Huntington v. Knox, 7 Cush. 371. But in suits on promissory notes or bills of exchange, no evidence is admissible to charge any person as principal whose name is not in some way disclosed on the face of the note or draft. This point has been often decided in this commonwealth, and the reasons on which the rule rests have been fully stated in very recent decisions. Slawson v. Loring, 5 Allen 340, and cases cited.

We do not see how the plaintiff was aggrieved by the ruling of the court allowing the defendant to file the written paper consenting to a verdict on the count for labor and services. The plaintiff had a verdict for all that he could legally claim, and he could not rightfully use the fact that the defendant was willing to be held responsible for the amount of the account as evidence of his liability on the notes. Exceptions overruled.[1]

KAYTON ET AL. v. BARNETT ET AL.

1889. COURT OF APPEALS OF NEW YORK. 116 N. Y. 625.

APPEAL from judgment of the general term of the superior court of the city of New York, entered upon an order made December 2, 1886, which denied a motion for a new trial and directed judgment in favor of defendants, entered upon an order non-suiting plaintiffs on trial.

[1] See full discussion regarding the liability of an undisclosed principal on a negotiable instrument in Sparks v. Dispatch Transf. Co., 104 Mo. 531. In Bean v. Pioneer Mining Co., 66 Cal. 451, a promissory note read "we promise to pay," etc., and was signed "Pioneer Mining Company, John E. Mason, Sup't." It was held that, as the note was ambiguous, parol evidence was admissible to show that it was the note of the company.

See Van Dyke v. Van Dyke, 123 Ga. 686.

See discussion of Coaling Co. v. Howard, 130 Ga. 807, in 22 Harv. Law Rev. 56.

This action was brought to recover a balance of the purchase-price alleged to be due for certain property sold by plaintiffs to defendants.

On the 17th day of March, 1881, the plaintiffs sold and delivered to William B. Bishop several machines, and assigned to him certain letters-patent for the agreed price of $4,500. Bishop paid $3,000 on delivery and gave three notes, dated March 24, 1881, for $500 each, one due nine months, one fifteen months and one eighteen months after date, without interest. June 29, 1883, Bishop died insolvent without having paid the notes, or any part of them. The plaintiffs tendered the notes to the defendants, and on August 22, 1883, brought this action to recover the part of the purchase-price represented by the notes, on the theory that Bishop, as agent for the defendants, bought the property for them, without disclosing his principals until after the execution and delivery of the notes. The defendants, in their answer, denied that they purchased the property, and alleged that it was bought by William B. Bishop, for the price and on the terms stated in the complaint.

Further facts appear in the opinion.

Follett, Ch. J.—When goods are sold on credit to a person whom the vendor believes to be the purchaser, and he afterwards discovers that the person credited bought as agent for another, the vendor has a cause of action against the principal for the purchase-price. The defendants concede the existence of this general rule, but assert that it is not applicable to this case, because, while Bishop and the plaintiffs were negotiating, they stated they would not sell the property to the defendants, and Bishop assured them he was buying for himself and not for them. It appears by evidence, which is wholly uncontradicted, that the defendants directed every step taken by Bishop in his negotiations with plaintiffs; that the property was purchased for and delivered to the defendants, who have ever since retained it; that they paid the $3,000 towards the purchase-price, and agreed with Bishop, after the notes had been delivered, to hold him harmless from them. Notwithstanding the assertion of the plaintiffs that they would not sell to the defendants, they, through the circumvention of Bishop and the defendants, did sell the property to the defendants, who have had the benefit of it, and have never paid the remainder of the purchase-price pursuant to their agreement. Bishop was the defendants' agent. Bishop's mind was, in this transaction, the defendants' mind, and so the minds of the parties met, and the defendants having, through their own and their agent's deception, acquired the plaintiffs' property by purchase, cannot successfully assert that they are not liable for the remainder of the purchase-price because they, through their agent, succeeded in inducing the defendants to do that which they did not intend to do, and, perhaps, would not have done had the defendants not dealt disingenuously.

The judgment directed [illegible] and costs to abide the event.

All others, except Gaudet, J., [illegible]

Judgment accordingly.

KELLY v. [illegible]

1900. Settlement [illegible]

WARE, J.—This is an action for the [illegible] The following extract, which is from the [illegible]

"Received of D. T. Kelly the sum of [illegible] purchase-price of lot [illegible] day of the date hereof [illegible] I agree to make out [illegible] good and [illegible] ready deed conveying said premises to said Kelly [illegible] unless [illegible] delay, and as soon as the [illegible] shall have been examined and approved, at which time said Kelly shall pay to me the sum of $[illegible] in cash and [illegible] the balance of the purchase-price he shall pay in three equal annual instalments with 6 per cent. interest, to be secured by deed of trust executed on said property. If Kelly fail to convey good title to said premises to said Kelly as aforesaid, then said sum shall be refunded to him.

RICHARD [illegible]
MARGARET [illegible]
D. T. KELLY."

James T. Kelly, coming to be [illegible] purchase, [illegible] tendered to [illegible] the [illegible] of [illegible] agreement and

[illegible]

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur, except Haight, J., not sitting.

Judgment reversed.[1]

KELLY v. THUEY ET AL.

1890. SUPREME COURT OF MISSOURI. 102 Mo. 522.

BLACK, J.—This is an action for the specific performance of the following contract, which is dated the 16th of December, 1885:

"Received of D. T. Kelly $50, being in part payment of the purchase-price of fifty-two feet by fifty off the west end of lot No. * * * I agree to make and deliver a good and sufficient warranty deed conveying said premises to said Kelly free of all incumbrances without delay, and as soon as the abstract of title thereto shall have been examined and approved, at which time said Kelly shall pay to me the sum of $950 in cash and ($664) the balance of the purchase-price he shall pay in three equal annual installments, with 8 per cent. interest, to be secured by deed of trust executed on said property. If I shall fail to convey good title to said premises to said Kelly as aforesaid, then said $50 shall be refunded to him.

"RICHARD x TOOEY,
"BRIDGET x TOOEY,
"D. T. KELLY."

James T. Kelly, claiming to be the real purchaser, in due time tendered to Thuey the balance of the cash payment and offered the

[1] "It may certainly be now regarded as a point settled, beyond all possible controversy, that if an agent, duly authorized, makes a contract in his own name, without disclosing his principal, and even when such principal is entirely unknown to the other contracting party, he is nevertheless bound, and damages may be recovered of him in an action for its breach. By contracting in his own name, the agent only adds his personal obligation to that of the person who employs him." Sharswood, J., in Youghiogheny Iron Co. v. Smith, 66 Pa. St. 340, 343.

Parol evidence is admissible to establish the liability of an undisclosed principal upon a written contract executed by the agent in his own name. Chandler v. Coe, 54 N. H. 561. On page 572, Hibbard, J., quotes the following from the opinion of Baron Parke in Higgins v. Senior, 8 M. & W. 834: "This evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind, but shows that it also binds another by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal."

Where the memorandum of agreement, required by the Statute of Frauds, was signed in his own name by the agent of an undisclosed principal, parol evidence is admissible to establish the identity of the principal, who will be liable upon the agreement. Roehl, Adm'r, v. Haumesser, 114 Ind. 311.

contract by executing his notes and deed of trust for the deferred payments.

Two or three days after the execution of the contract, Thuey sold and conveyed the entire lot to the defendant, Bush, who purchased with full knowledge of the outstanding contract.[1] * * * 3. The further defense is that the defendant Thuey made no contract whatever with the plaintiff, James T. Kelly. The evidence of D. T. Kelly is, that Thuey asked him to find a purchaser for a part of the lot, and that he mentioned the matter to his brother, James T. Kelly, who concluded to buy the fifty-two feet; and that he, D. T. Kelly, then entered into the contract in question. The first contract was informal, and James T. Kelly, the plaintiff, had a more formal one prepared, which is the one now in question, and D. T. Kelly signed it and then had it signed by Thuey. James T. Kelly furnished the $50 paid at the time the contract was executed. As between the two Kellys, it is clear that the property was purchased for James T.; but he had the contract made in the name of his brother. The other evidence does not show that Thuey knew James T. Kelly had any interest in the transaction; so far as the evidence goes, it would seem he had no such knowledge. The answer of Thuey, however, states that D. T. Kelly said a man for whom he was acting, but whose name he did not give, would purchase the property, and that by false statements he induced defendant to agree to sell the property to the party for whom Kelly was acting.

We must take this verified answer as an admission that Thuey knew D. T. Kelly was buying the property for an unnamed person. The other evidence shows that he was acting for plaintiff, but this Thuey did not know. The contract was taken in the name of the agent by the directions of the plaintiff, for he had it prepared. Under these circumstances, can the plaintiff compel specific performance?

Where, as here, the contract is not under seal, if it can be gathered from the whole instrument that one party acted as agent, the principal will be bound, or he may sue thereon in his own name. Indeed, if the instrument is so uncertain in its terms as to leave it in doubt whether the principal or agent is to be bound, such uncertainty may be obviated by the production of parol evidence. Hartzell v. Crumb, 90 Mo. 630; Klostermann v. Loos, 58 Mo. 290. But these principles cannot aid the plaintiff in this case, for there is nothing whatever on the face of this contract to show that D. T. Kelly acted as agent for any one.

The plaintiff insists that a much more comprehensive doctrine should be applied, and he refers to the often cited case of Higgins v. Senior, 8 Mees. & Wel. 843, which was a contract for the sale

[1] A portion of the opinion is omitted.

of goods. The question presented there was whether the defendant could discharge himself by proving that the agreement, though made in his own name, was really made by him as the agent of a third person, and this was known to the plaintiff when the contract was signed. "There is no doubt," says the court, "that where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract so as to give the benefit of the contract on the one hand to, and charge with liability on the other the unnamed principal; and this, whether the agreement be or be not required to be in writing by the statute of frauds."

Such proof, it is said, does not violate the rule of law, which says, parol evidence will not be received to vary the terms of a written contract because it only shows that the agreement binds another person by reason of the act of the agent in signing the agreement pursuant to his authority. The doctrine of that case has been quoted with approval by this court on two occasions. Briggs v. Munchon, 56 Mo. 467; Higgins v. Dellinger, 22 Mo. 397. The following and many other authorities are to the same effect: Story on Agency (9th ed.), § 160a; Whart. on Agents, § 403; Fry on Spec. Perf., § 148; Huntington v. Knox, 7 Cush. 371; Briggs v. Partridge, 64 N. Y. 357.

This broad doctrine, that, when an agent makes a contract in his own name only, the known or unknown principal may sue or be sued thereon, may be applied in many cases with safety, and especially in cases of informal commercial contracts. But it is certain that it cannot be applied where exclusive credit is given to the agent, and it is intended by both parties that no resort shall be had by or against the principal (Story on Agency, § 160a), nor does it apply to those cases where skill,[2] solvency or any personal quality of one of the parties to the contract is a material ingredient in it. Fry on Spec. Perf., § 149.

Now, in this case, the written contract is full, complete and formal. It expresses just what the parties thereto intended it should express. The plaintiff had it prepared, and must be taken to have directed it to be made in the name of D. T. Kelly and not in his own name. In short, the contract is one between Thuey and D. T. Kelly, and was so intended by all parties. It contains agreements to be performed by both parties. Thuey agreed to sell the land to D. T. Kelly and agreed to take the latter's notes and deed of trust for the deferred payments. He did not agree to take the notes and deed of trust of the plaintiff for the deferred payments. To admit parol evidence to show that D. T. Kelly acted as an agent of the plaintiff, and then substitute, or add, the plaintiff as a party, is sim-

[2] Regarding the right of a client to the personal services of an attorney retained by him see Eggleston v. Boardman, 37 Mich. 14, 19.

ply to make a new contract for the parties. To say that the admission of such evidence does not alter the written contract, in a case like the one in hand, is a doctrine too subtle and refined to be comprehended. D. T. Kelly contracted for the warranty deed of Thuey, and he is entitled to Thuey's covenant of warranty, and could not be required to take the covenants of some person to whom Thuey should sell the property. Steiner v. Zwickey, 43 N. W. 376.

So, on the other hand, Thuey contracted for, and is entitled to have, the notes and deed of trust of D. T. Kelly, and he cannot be compelled to take the notes of another person. Whatever the rights may be as between the Kellys, the plaintiff is not a party to the contract with Thuey, and he cannot enforce specific performance of it and thereby compel Thuey to accept his obligations for the deferred payments.

The right to enforce specific performance of this contract exists in D. T. Kelly and not the plaintiff. D. T. Kelly must make the note and deed of trust, and to that end the title must be vested in him, and he is, therefore, a necessary and indispensable party to this suit. The judgment is, therefore, reversed and the cause remanded.

All concur.

WATTEAU v. FENWICK.

1892. Queen's Bench Division. L. R. (1893) Q. B. D. 346.

Appeal from the decision of the county court judge of Middlesborough.

From the evidence it appeared that one Humble had carried on business at a beerhouse called the Victoria Hotel, at Stockton-on-Tees, which business he had transferred to the defendants, a firm of brewers, some years before the present action. After the transfer of the business, Humble remained as defendants' manager; but the license was always taken out in Humble's name, and his name was painted over the door. Under the terms of the agreement made between Humble and the defendants the former had no authority to buy any goods for the business except bottled ales and mineral waters; all other goods required were to be supplied by the defendants themselves. The action was brought to recover the price of goods delivered at the Victoria Hotel over some years, for which it was admitted that the plaintiff gave credit to Humble only; they consisted of cigars, bovril, and other articles. The learned judge allowed the claim for the cigars and bovril only, and gave judgment for the plaintiff for 22*l* 12s 6d. The defendants appealed.

Wills, J.—The plaintiff sues the defendants for the price of cigars supplied to the Victoria Hotel, Stockton-upon-Tees. The house was kept, not by the defendants, but by a person named Hum-

ply to make a new contract for the purpose. In any case the admission of such evidence does not alter the written contract, as in this case the son in law is a doctrine not established since the 1st Edward. D. T. for the attached for the [illegible] deed of Thuey and he is entitled to Thuey's covenant of [illegible] and could not be required to take the covenants of some person [illegible] Thuey should sell elsewhere. Stones v. Pulcher, 1 L. R. 478.

So on the other hand, Thuey contracted for and is entitled to have the notes and deed of trust of D. T. Kelly, and he cannot be compelled to take the notes of another person. Whatever the rights may be as between the Kellys, the plaintiff is not a party to the contract with Thuey, and he cannot enforce the performance of it and thereby compel Thuey to accept his obligations for the deferred payments.

The right to enforce specific performance of the contract exists in D. T. Kelly and not the plaintiff. D. T. Kelly must make the note and deed of trust and to him and the [illegible] vested in him and he is therefore a necessary and [illegible] party to this suit. The judgment is therefore [illegible] and the cause remanded.

All concur.

[illegible] L. R. Vol. 13, p. D. 346

Appeal from the [illegible] county court judge of Middlesex county.

From the evidence it appeared that one Humble had carried on business as a [illegible] under the Victoria Hotel, in Stockton-on-Tees, which business he had transferred to the defendants, a firm of brewers, [illegible] for the purpose. After the transfer of the business Humble remained as defendants' manager; but the license was always [illegible] Humble's name, and his name was retained over the door. By the [illegible] the agreement made between Thuey and the defendants the latter had no authority to pay any goods for the business except [illegible] and [illegible] all other goods [illegible] to be ordered by the defendants themselves. The plaintiffs brought an [illegible] the price of goods delivered [illegible] Victoria Hotel some years, for which it was contended that the defendants [illegible] only; they consisted of cigars, [illegible] articles. The learned judge allowed the claim for the [illegible] and gave judgment for the plaintiffs for £21 [illegible] defendants appealed.

Watson, Q.C. The plaintiffs sued the defendants for the price of liquors supplied at the Victoria Hotel, Stockton-upon-Tees. The house was kept not by the defendants but by a person named Hum-

ble, whose name was over the door. The plaintiff gave credit to Humble, and to him alone, and had never heard of the defendants. The business, however, was really the defendants', and they had put Humble in it to manage it for them, and had forbidden him to buy cigars on credit. The cigars, however, were such as would usually be supplied to and dealt in at such an establishment. The learned county court judge held that the defendants were liable. I am of opinion that he was right.

There seems to be less of direct authority on the subject than one would expect. But I think that the Lord Chief Justice during the argument laid down the correct principle, viz., once it is established that the defendant was the real principal, the ordinary doctrine as to principal and agent applies—that the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority. It is said that it is only so where there has been a holding out of authority—which cannot be said of a case where the person supplying goods knew nothing of the existence of a principal. But I do not think so. Otherwise, in every case of undisclosed principal, or at least every case where the fact of there being a principal was undisclosed, the secret limitation of authority would prevail and defeat the action of the person dealing with the agent and then discovering that he was an agent and had a principal.

But in the case of a dormant partner it is clear law that no limitation of authority as between the dormant and active partner will avail the dormant partner as to things within the ordinary authority of a partner. The law of partnership is, on such a question, nothing but a branch of the general law of principal and agent, and it appears to me to be undisputed and conclusive on the point now under discussion.

The principle laid down by the Lord Chief Justice, and acted upon by the learned county court judge, appears to be identical with that enunciated in the judgments of Cockburn, C. J., and Mellor, J., in Edmunds v. Bushell (1), the circumstances of which case, though not identical with those of the present, come very near to them. There was no holding out, as the plaintiff knew nothing of the defendant. I appreciate the distinction drawn by Mr. Finlay in his argument, but the principle laid down in the judgments referred to, if correct, abundantly covers the present case. I cannot find that any doubt has ever been expressed that it is correct, and I think it is right, and that very mischievous consequences would often result if that principle were not upheld.

In my opinion this appeal ought to be dismissed with costs.

Appeal dismissed.[1]

[1] See discussion of the principal case in 7 Harv. Law Rev. 49. Compare Schendel v. Stevenson, 153 Mass. 351.

BROOKS v. SHAW.

1908. Supreme Judicial Court of Massachusetts. 197 Mass. 376.

Contract or tort to recover the value of goods of the plaintiff alleged to have been lost by the defendants who, being engaged in business under the name of "Sawin's Express," accepted them for transportation to the plaintiff. Writ in the municipal court of the city of Boston dated April 9, 1906.

Rugg, J.—[1] * * * The trial judge found that for a period of many years prior to September 1, 1904, one M. M. Sawin carried on an express business between Boston and Cambridge under the name of "Sawin's Express," and that Herbert E. Sawin was assistant manager. The defendants acquired the business in September, 1904, and continued to carry it on under the name of "Sawin's Express" in the same manner in which it had been carried on theretofore without change in the name, lettering on wagons, or billheads, and Herbert E. Sawin was continued as the agent at Cambridge in charge of the business. In November, 1905, a dress belonging to the plaintiff was lost while being transported by Sawin's Express from Boston to Cambridge, it having been received from the consignor on a contract limiting liability in case of loss to $50. The defendants were unable to find the package, and Herbert E. Sawin in a conversation with an agent of the plaintiff said, in substance, that he preferred, rather than to pay for the one that was lost, that the plaintiff should get a new dress and that he would settle for it. At the time of this conversation neither the plaintiff nor her agent had any knowledge of the transfer of Sawin's Express to the defendants, but believed that it was being carried on by the same persons as before the sale. Herbert E. Sawin disclosed no agency, and purported to act as principal, but in fact had no authority to bind the defendants by the proposition made. His instructions being to refer all claims in excess of $3 to the Boston office. No notice of this limitation of authority was brought home to the plaintiff or her agent. The judge further found that Herbert E. Sawin in dealing with the plaintiff and her agent was in fact agent for the defendants, who were undisclosed principals, and ruled that the plaintiff had a right of action against the defendants, and that they could not set up the limitation which they had imposed upon the authority of Sawin and found for the plaintiff. The judge also refused to rule that if at the time of the promise the plaintiff and her agent supposed that M. M. Sawin was the owner of the Sawin's Express, and did not know or understand that Herbert E. Sawin was acting for the defendants, then the plaintiff was bound by the actual authority of Herbert E. Sawin. The defendants' exception to the

[1] A portion of the opinion is omitted.

judge] ordered to give the ruling [or to the ruling actually made] brings the case before us.

The defendants had not [redacted] to act as their agent to transact [any] business in Cambridge [redacted] had express authority to settle claims not exceeding $3. [redacted] that an unauthorized wrongful act may be charged with responsibility for and avoid himself of the benefit of the acts of his agent is well settled. [redacted] v. Fordham, 134 Mass. 180. It follows from this that, [redacted] the relation of principal and agent is found to exist, the necessary rules of responsibility of the principal to third persons for the act of the agent are established. The principal is responsible for all acts of the agent within the apparent scope of his authority, or, to use the phrase of Mr. Justice Holmes in 5 Harv. Law Review, 1, [redacted] in the circumstances known to him, the obvious consequence of the principal's own conduct in employing the agent is that the public would have him to have given the agent certain powers he gave the agent those powers. [redacted] "An agent's ostensible powers carry [redacted] real power." Limitations of authority between principal and agent or an apparently general authority, not brought to the knowledge of third persons, do not affect the rights of the latter. One of the usual incidents of carrying on business is to settle the losses that occur in connection with that business. By an arrangement between the defendants and Herbert E. Smith, the agent's authority as to losses was limited to $3; but his ostensible powers gave no notice of any limitation upon the extent of his authority in this respect. Therefore the plaintiff was not bound by it. [redacted] v. Fenwick, [redacted] 1 Q. B. 346; Ireland v. Bicknell, [redacted] P. 97; Sparr v. Cass, L. R. 5, Q. B. 650; Irons v. Watson, [redacted] 6 Ex. 424.

Exceptions overruled.

THOMAS v. [redacted]

1871. Supreme Court of [redacted]

Pettit, J.—This suit was brought by the [redacted] against the appellant. The complaint states that the [redacted] contracted with the appellee twenty thousand eight hundred and [redacted] feet of black-walnut lumber, for which appellee [redacted] was obligated to pay at the rate of thirty-three dollars per thousand feet, and that three

[redacted] Hilliard [redacted] Bigelow, [redacted] P. [redacted] 1 Met. 560 at the time Mr. [redacted] J., said: "The rule as [redacted] plaintiff in some way [redacted] dealing with an agent [redacted] his authority to bind [redacted] but also [redacted] a careful examination [redacted] that those dealings [redacted] Court were [redacted] and [redacted] dealings on the part of [redacted] corresponding [redacted] agent."

BROOKS v. SHAW.

1908. Supreme Judicial Court of Massachusetts. 197 Mass. 376.

CONTRACT to recover the value of goods of the plaintiff alleged to have been lost by the defendants, who, being engaged in business under the name of "Sawin's Express," carried them for transportation to the [illegible] Writ in the municipal court of the city of Boston dated April 6, 1906.

Read, J. [illegible] The trial judge ruled, that for a period of many years prior to [illegible] 1, 1904, one M. [illegible] Sawin carried on an express business [illegible] Boston and Cambridge under the name of "Sawin's Express," and that Herbert E. Sawin was assistant manager. The [illegible] carried the business to September, 1904, and continued [illegible] under the name of "Sawin's Express" in the same [illegible] which it had been carried on theretofore without [illegible] Hillheads, and Herbert E. Sawin was [illegible] as the agent of the bridge in charge of the business. In December, 1905, a [illegible] belonging to the plaintiff [illegible] Sawin's Express from [illegible] it having been received from the consignor [illegible] falsely in the sum of not to $50. The defendants [illegible] and the package and Herbert E. Sawin in a [illegible] agent of the plaintiff said in substance that [illegible] to pay the [illegible] that was lost, that the [illegible] Dec. and that he would settle for it. At the time of the conversation neither the plaintiff nor her agent had any knowledge [illegible] Sawin's Express to the defendants [illegible] being conducted by the same persons as before the [illegible] E. Sawin disclosed no agency, and purported to act [illegible] and no authority to bind the defendants [illegible] The instructions being to refer all claims [illegible] the Boston office. No notice of this limitation of [illegible] was given to the plaintiff or her agent. The [illegible] Herbert E. Sawin in dealing with the plaintiff [illegible] for the defendants [illegible] that the plaintiff had a right of action against the defendants, and that they could not set up the unauthorized acts [illegible] against the authority of Sawin and found for the plaintiff. The judge refused to rule that if at the time of the transfer the plaintiff and her agent supposed that M. M. [illegible] Sawin's Express, and did not know of [illegible] Herbert E. Sawin was acting for the defendants they [illegible] bound by the actual authority of Herbert E. [illegible] The defendants' exception to the

[illegible] portion of the opinion is omitted.

judge's refusal to give this ruling and to the ruling actually made brings the case before us.

The defendants held out Herbert E. Sawin as their agent to transact their business in Cambridge. He had express authority to settle claims not exceeding $3. The doctrine that an undisclosed principal may be charged with responsibility for and avail himself of the benefit of the acts of his agent is well settled. Byington v. Simpson, 134 Mass. 169. It follows from this, that, when the relation of principal and agent is found to exist, the ordinary rules of responsibility of the principal to third persons for the act of his agent are established. The principal is responsible for all acts of the agent within the apparent scope of his authority, or, to use the phrase of Mr. Justice Holmes in 5 Harvard Law Review, 1, "If, under the circumstances known to him, the obvious consequences of the principal's own conduct in employing the agent is that the public understand him to have given the agent certain powers, he gives the agent those powers. * * * An agent's ostensible powers (are) his real powers." Limitations as between principal and agent of an apparently general authority, not brought to the knowledge of third persons, do not affect the rights of the latter. One of the usual incidents of carrying on business is to settle the losses that occur in connection with that business. By an arrangement between the defendants and Herbert E. Sawin, the agent's authority as to losses was limited to $3, but his ostensible powers gave no notice of any limitation upon the extent of his authority in this respect. Therefore the plaintiff was not bound by it. Watteau v. Fenwick (1893) 1 Q. B. 346; Edmunds v. Bushell, L. R. 1 Q. B. 97; Spurr v. Cass, L. R. 5, Q. B. 656; Irvine v. Watson, 5 Q. B. D. 414.

Exceptions overruled.[2]

THOMAS v. ATKINSON.

1871. Supreme Court of Indiana. 38 Ind. 248.

Pettit, J.—This suit was brought by the appellee against the appellant. The complaint states, that the appellant purchased of the appellee twenty thousand, eight hundred and sixty-four feet of black-walnut lumber, for which appellant agreed and promised to pay at the rate of thirty-three dollars per thousand feet; that three

[2] *Accord:* Hubbard v. Tenbrook, 124 Pa. St. 291. On page 296 of that case Mitchell, J., said: "The rule so vigorously contended for by the plaintiff in error, that those dealing with an agent are bound to look to his authority, is freely conceded, but this case falls within the equally established rule that those clothing an agent with apparent authority are, as to parties dealing on the faith of such authority, conclusively estopped from denying it."

hundred and eighty dollars had been paid, leaving due and unpaid three hundred and fifty dollars, for which judgment was demanded.

Answer, first, general denial; second, payment. Reply of general denial to second paragraph of the answer. Trial by the court; finding for the plaintiff, appellee, in the sum of three hundred and eight dollars and thirty-seven cents.

Motion for a new trial, for the following reasons:

First. The finding is contrary to law.

Second. The finding of the court is contrary to the evidence.

Third. The finding of the court is not sustained by sufficient evidence.

Fourth. For error of law occurring at the trial, and excepted to by the defendant at the time, in this, to wit: first, the court allowed improper evidence over the objection pointed out at the time to the court; second, the court rejected proper evidence offered by the defendant; third, the court refused to receive material and proper evidence offered by the defendant.

This motion was overruled; exception; and judgment on the finding was rendered.

The whole evidence given, offered, and refused, is as follows. For plaintiff:

Josephus Atkinson, the plaintiff, testified that some time during the latter part of November, 1868, one William H. Munday came to him and stated that he wished to buy some walnut lumber, and would pay the plaintiff thirty-three dollars per thousand feet; that he accepted the offer, and agreed to deliver the lumber to Munday at the railroad; that he did not know the defendant at that time; that Munday advanced him one hundred dollars on the lumber; that in accordance with his contract with Munday he afterward delivered to Munday twenty thousand eight hundred and sixty-four feet, for which Munday had paid him in all three hundred and eighty dollars, leaving a balance due of three hundred and eight dollars; that soon after the lumber had been delivered at the railroad, he met the defendant, told him the bargain he had made with Munday, and requested the defendant to tell Munday when he should see him that the lumber was there, which the defendant agreed to do; that in a few days Munday went and measured the lumber and shipped it to the defendant at Toledo, Ohio; that Munday then told the plaintiff to go to Delphi, and he would pay him for the lumber, but it was agreed that Munday should send the money by express in a day or two; that about the middle of May, 1869, Munday having failed to send the money as he agreed to do, the plaintiff went to Delphi to know the reason of Munday's failure to send the money; that previous to going he had received a letter from Munday, stating that the defendant had not paid him, Munday, for the lumber; that while at Delphi the plaintiff met the defendant and stated to him that Munday had written,

hundred and eighty dollars has been paid, leaving due and unpaid three hundred and fifty dollars, for which [illegible] was demanded.

[illegible] that, several days] after the [illegible] deed of conveyance] denied the second paragraph of the [illegible] reply to the court finding for the plaintiff [illegible] hundred and eight dollars and [illegible] cents.

Motion for a new trial [illegible]

First. The finding is [illegible]

Second. The finding of the court is contrary to the evidence.

Third. The finding of the court is not sustained by sufficient evidence.

Fourth. The rulings of the court on the trial, and excepted to by the defendant [illegible] that the court allowed [illegible] and at the time to the court [illegible] the same and proper evidence offered by the defendant [illegible] competent, relevant and proper evidence offered by the defendant.

This motion was overruled, exception and judgment on the finding [illegible]

The [illegible] which was refused, is as follows: [illegible]

[illegible] testified that some time during the [illegible] Wolcott [illegible] Monday came to [illegible] and [illegible] to buy some walnut lumber, and would pay for [illegible] dollars per thousand feet; that he accepted the [illegible] and [illegible] the lumber to Monday at the [illegible] that [illegible] the defendant at that time; that Monday [illegible] dollars on the lumber; that in [illegible] that the [illegible] he afterward delivered to Monday [illegible] three hundred and forty-four feet [illegible] that [illegible] him in all three hundred and [illegible] that the [illegible] day of June three hundred and [illegible] that the lumber had been delivered at the railway [illegible] and [illegible] told him the lumber [illegible] that [illegible] the defendant [illegible] that Monday [illegible] that [illegible] Monday went and [illegible] the lumber [illegible] at Toledo, Ohio; that Monday [illegible] at Delphi, and he would pay him for the lumber [illegible] that Monday owned and [illegible] to suppose it [illegible] that about the middle of May, 1876, Monday [illegible] and the money as he agreed to do; the plaintiff went to Delphi to know the reason of Monday's failure to send the money, and [illegible] to going he had received a letter from Monday stating that the defendant had not paid him, Monday, for the lumber; that while at Delphi the plaintiff met the defendant and stated to him that Monday had written,

and the defendant said it was not true, as he had paid Munday in full for the lumber; when the plaintiff went to see Munday, but could get nothing out of him for the lumber; that the next time he met the defendant, he told the defendant that he should look to him for his pay, because it was measured, marked, and shipped in his name; and that this was several days after he met the defendant in Delphi, when the defendant told him that he had paid Munday in full for the lumber.

On cross-examination, the plaintiff testified that when he contracted with Munday for the sale of the lumber, he did not know the defendant; that his contract with Munday was not in writing, because he then had great confidence in him, as he had known him a long time; that he made no charge against the defendant for the lumber; that the defendant never agreed or promised to pay him for the lumber; that when, after failing to get his pay from Munday, he told the defendant he should hold him responsible for the lumber, the defendant denied that he was liable; that he was not aware that the defendant had ever recognized Munday as his agent, and that he had made no inquiries on that point of any one; that after he had failed to get the balance due him from Munday, he had addressed a letter, dated June 7, 1869, to the defendant, stating that he wanted his money, and that the defendant, as an honorable man, ought to see that he got his pay; in answer to which the defendant maintained that he was not indebted to him.

George W. Hubbard testified that he was in the lumber trade, and met the defendant in the winter of 1868 and 1869, when the defendant stated that he was to get from Munday the plaintiff's lumber, but he did not state how, or with whom he had contracted for it.

David E. Emely testified that he was in Rockfield the morning that Munday went to measure the lumber in question, when the defendant told Munday to go and measure the lumber and ship it to him at Toledo, Ohio, and he would take it at Munday's measurement, and also told Munday to tell the plaintiff to go to Delphi, after the lumber was measured, and get his pay from Munday.

William M. Munday testified that some time in November, 1868, he told the defendant he could buy the plaintiff's lumber if the defendant would advance him, Munday, money on it, and the defendant advanced him, Munday, one hundred and twenty-five dollars; that he was acting as the agent of the defendant in the purchase of this lot of lumber; that he advanced the plaintiff one hundred dollars on it; that when the lumber was ready to be measured at the railroad, the defendant told him to go and measure it, and he, the defendant, would pay him, Munday, for it; that he measured it and had it shipped to the defendant at Toledo.

On cross-examination, this witness testified that he was never the agent of the defendant except in the purchase of this particular

lumber; that he did not know what facts were necessary to constitute an agency; that he had a written contract with the defendant for lumber, and that the following was a copy of the contract:

"Camden, Carroll County, Ind., Nov. 26, 1868.

"W. M. Munday, of Rockfield, Indiana, contracts to A. J. Thomas and E. C. Rice, of Camden, Carroll county, Indiana, two hundred thousand feet of black walnut lumber, said lumber to be from one to four inches thick, or as the said Thomas and Rice may direct, and from ten to sixteen feet long, and six inches and upwards in width; to be free from hearts, shakes, and rotten knots, and good merchantable lumber, subject to Wheelock and Tuttle's inspection, at Toledo, Ohio. The said Munday agrees to deliver one hundred thousand feet of said lumber on cars at Rockfield or vicinity, at his own expense, by the first of June, 1869, and one hundred thousand feet by the first of October, 1869. The said Thomas and Rice agree to pay the said Munday thirty-five dollars per thousand feet, when said lumber is delivered aboard of cars.

"William M. Munday."

That on this contract the defendant advanced to him the one hundred and twenty-five dollars; that he told the defendant he wanted to advance this one hundred and twenty-five dollars to the plaintiff; that he only gave the plaintiff one hundred dollars of it, and the balance he kept; that the contract was a sham; that he did not know that Rice had anything to do with it; that he read it carefully before signing; that he did not know that Rice was a partner of the defendant; that he did not know what compensation he was to receive for his services as agent; that the defendant never held him out to the world as an agent; that he never bought any other lumber as the agent of the defendant; that the defendant never authorized him to represent to the plaintiff that he was the defendant's agent; that the defendant did not authorize him to buy lumber on the credit of the defendant; and that the plaintiff had not threatened him with a criminal prosecution in the event of his failure to obtain a judgment against the defendant.

Defendant's evidence:

Andrew J. Thomas, the defendant, testified that Munday was never his agent for the purchase of lumber from the plaintiff or any other person, nor was ever Munday his agent for the transaction of any business of any character; that he did not know that Munday was representing himself as his agent, or that he claimed to be his agent, until after the plaintiff had informed him that Munday had failed to pay him; that the only contract he ever had with Munday was the written contract executed on the 26th day of November, 1868, about which Munday testified; that the contract was not a sham, but was made in good faith, and the lumber sold by the plaintiff to Munday was applied by Munday on that contract; that Rice and the witness, at the time of the execution of the con-

trade, were in partnership in the lumber business, and Monday knew the fact, for the whole dealings in relation to the purchase and delivery of the lumber were had with Monday. Monday was not made acquainted in any manner except as a customer in the firm of Thomas & Rice; nor at the time he did not know the plaintiff, and only made his acquaintance a few days after, when the plaintiff requested him that he should inform Monday, when a customer came for him, that he had some lumber at the railroad for sale. Three days, and he agreed to do so; that this lumber was measured and shipped to their firm, at Toledo, Ohio; that on the 20th day of May, 1869, he met Monday at Detroit, and in about a week afterwards he met the plaintiff there, when the plaintiff inquired as to the circumstances of Monday owing that Monday had not come to him as he had agreed to send the money by express, that he (plaintiff) did not ask or intimate that the witness should pay him for the lumber; the first information that the witness had of such an intimation being entertained was by the letter from the plaintiff dated on the 7th of June, 1869; that a few days after that letter was received he met the plaintiff, who informed him that Monday had deceived him, and he could not see his money; that he never promised, directly or indirectly, that he would pay the plaintiff or see that he was paid, for he had no dealings with him in any shape; and that he had stated to the witness Hosford that he would get the plaintiff's lumber from Monday, who had contracted with the plaintiff for it.

Here the defendant offered to prove that on the 22nd day of May, 1869, before the plaintiff had informed him that Monday had acted in bad faith, and had failed to pay him for the lumber, and Monday made a complete settlement of all matters and accounts between them, which included the lumber here in question, and it was found there was due Monday [illegible] dollars and fifty-four cents, which was the balance due [illegible] day, which closed the account between them, and from the date of the account had not since changed. This evidence was objected to by the court, and the defendant excepted to the ruling.

Elijah C. Rice testified that he was a partner in the lumbering, and was in November, 1868, when the contract referred to by the witness Monday and the defendant was executed; that he signed the contract in the presence of Monday and [illegible] he [illegible] to come, and told Monday to [illegible] 1869, if he did not that he desired to make such a contract for lumber; that he never heard or knew of Monday claiming to be the agent of the defendant, nor [illegible] the defendant, but to pay the plaintiff for his lumber, and that he had no dealings with the defendant and Monday on the [illegible] day.

Here the defendant offered to prove by the witness and on and [illegible]

lumber, that he did not know what [illegible] necessary to constitute an agency, that he had a written [illegible] the defendant for lumber, and that the following was a copy of the contract:

"Camden, Carroll County, Ind., Nov. [illegible]

W. M. Munday, of Rockfield, Indiana, contracts to A. J. Thomas and R. C. [illegible] Camden, Carroll County, Indiana, two hundred thousand feet of black walnut timber, said lumber to be from one to four inches thick, or as the said Thomas and Rice may direct, and from ten to sixteen feet long, [illegible] inches and upwards in width, to be free from heart, shot, [illegible] rotten knots, and good merchantable lumber, subject to [illegible] and Tuttle's inspection, at Camden. The said W. M. Munday agrees to deliver one hundred thousand feet of said lumber at or near Rockfield or vicinity, as he can [illegible] by the first of June, 1869, and one hundred thousand feet by the first of October, 1869. The said Thomas and Rice agree to pay the said W. M. Munday five dollars per thousand for [illegible] and lumber is delivered on board of cars [illegible]

"Witness my hand, Munday."

[illegible] the defendant [illegible] to him the one hundred [illegible] dollars; that the defendant he was [illegible] one hundred [illegible] dollars to the plaintiff, and gave the plaintiff one hundred dollars of it, [illegible] that the contract was a sham; that he did [illegible] anything [illegible] with it; that he read it [illegible] that he did not know that Rice was a [illegible] that he did not know what compensation he was [illegible] that the defendant never held himself out [illegible] as an agent; that he never bought any other lumber [illegible] of the defendant; that the defendant never [illegible] to the plaintiff that he was the defendant's agent [illegible] and authorize him to buy lumber [illegible] that the plaintiff had not threatened [illegible] criminal prosecution in the event of his failure to obtain [illegible] against the defendant.

Defendant's [illegible]

Andrew J. [illegible] testified that Munday was never his agent [illegible] lumber from the plaintiff or any other person; that [illegible] Munday to [illegible] for the transactions of any business [illegible] character; that he did not know that Munday was representing [illegible] as his agent, or that he claimed to be his agent, until [illegible] and informed him that Munday had failed to pay [illegible] he ever had with Munday was the written [illegible] executed on the 20th day of November, 1868, [illegible] testified; that the contract was not a sham but was made [illegible] and the lumber sold by the plaintiff to Munday was applied on Munday on that contract, that [illegible] and the attempt [illegible] the execution of the con-

tract, were in partnership in the lumber business, and Munday knew the fact, for Rice wrote the contract in Munday's presence, and assisted in arranging its terms; that he was not at that time, nor since, engaged in any business except as a member of the firm of Thomas & Rice; that at that time he did not know the plaintiff, and only made his acquaintance in May, 1869, when the plaintiff requested him that he should inform Munday, when he should next see him, that he had some lumber at the railroad for him (Munday), and he agreed to do so; that this lumber was measured and shipped to their firm, at Toledo, Ohio; that on the 12th day of May, 1869, he met Munday at Delphi, and in about a week afterward he met the plaintiff there, when the plaintiff inquired as to the whereabouts of Munday, stating that Munday had not paid him, as he had agreed to send the money by express; that the plaintiff did not ask or intimate that the witness should pay him for the lumber; the first intimation that the witness had of such an expectation being entertained was in the letter from the plaintiff to him, on the 7th of June, 1869; that in a few days after that letter was received he met the plaintiff, who informed him that Munday had deceived him, and he could not get his money; that he never promised, directly or indirectly, that he would pay the plaintiff or see that he was paid; for he had no dealings with him in any shape; and that he had stated to the witness Hubbard that he would get the plaintiff's lumber from Munday, who had contracted with the plaintiff for it.

Here the defendant offered to testify that on the 12th day of May, 1869, before the plaintiff had informed him that Munday had acted in bad faith and had failed to pay him, the defendant and Munday made a complete settlement of all accounts and demands between them, which included the lumber from the plaintiff; when it was found there was due Munday two hundred and eight dollars and fifty-four cents, which sum the defendant then paid Munday, which closed the account between them; and that the state of the account had not since changed. This testimony was excluded by the court, and the defendant excepted to the ruling.

Elijah C. Rice testified that he was a partner of the defendant, and was in November, 1868, when the contract referred to by the witness Munday and the defendant was executed; that he wrote the contract in the presence of Munday, and assisted in arranging its terms; and that Munday first spoke to him about it, and said that he desired to make such a contract for lumber; that he never heard or knew of Munday claiming to be the agent of their firm, or the agent of the defendant, until after Munday had failed to pay the plaintiff for his lumber; and that he was present with the defendant and Munday on the 12th day of May, 1869.

Here the defendant offered to prove by this witness that on said

12th day of May, 1869, Munday, the defendant, and the witness had a full settlement of all their business transactions, including the lumber from the plaintiff, when a balance of two hundred and eight dollars and fifty-four cents due Munday was then paid him, which closed the account between them, and the state of the account has not since changed, and the lumber from the plaintiff was applied on the contract referred to without objections. This testimony was also excluded by the court, and proper exceptions taken by the defendant.

This was all the evidence given or offered in the case. In an able and learned brief for the appellant, a reversal of the judgment is asked and urged, for two reasons; first, because the finding of the court was not sustained by the evidence; second, because the court rejected material and proper evidence offered by the appellant. Upon a mere preponderance of evidence we cannot reverse a judgment below. This is well settled by a long line of decisions of this court; and for the reasons, among others, that we only see the evidence as it is written, in a bill of exceptions, while the jury and court below meet and see the witnesses face to face, see and observe their actions and may have divined their motives, prevarication, readiness or hesitancy in answering questions; but when, as in this case, there is absolutely no evidence to support the finding upon any known rule or law of evidence, it is our duty to reverse the judgment.

The whole evidence taken together thoroughly and effectually excludes the idea of Munday's agency. But, assuming all that is claimed by the appellee to be true, Munday was only an agent for the purchase of this particular lumber, and was therefore a special agent, with no authority, according to his own testimony, to buy the lumber on credit. Upon this theory of the case, the appellant was clearly not liable, for the agent in buying on credit exceeded his authority, as he himself testified. In support of this position, we refer to the familiar principle governing this class of agencies. The principle is thus stated by Judge Story, in his Commentaries on the Law of Agency, § 126:

"Before quiting this subject of the nature and extent of the authority of agents, it seems proper to refer again to what has been already incidentally stated, the distinction commonly taken between the case of a general agent and that of a special agent, the former being appointed to act in his principal's affairs generally, and the latter to act concerning some particular object. * * * In the latter case, if the agent exceeds the special and limited authority conferred on him, the principal is not bound by his acts; but they become nullities, so far as he is concerned; unless, indeed, he has held him out as possessing a more enlarged authority."

The author further says, § 133, that "where the agency is not held out by the principal, by any acts, or declarations, or implica-

agent, to be general or special as the particular act of business, it must ever necessarily be construed according to its real nature and extent; and the other party must act at his own peril and is bound to inquire into the nature and extent of the authority actually conferred. In such a case there is no ground to contend that the principal ought to be bound by the acts of the agent, beyond what he has apparently authorized, because he has not misled the confidence of the other party who has dealt with the agent. * * * The duty of inquiring [into] is incumbent on such party, since the principal has never held the agent out as having any general authority whatsoever to the premises; and if he trusts without inquiry, he trusts to the good faith of the agent and not to that of the principal."

And in Smith Mercantile Law, 173, after discussing the powers of a general agent to bind his principal in all matters coming within the general scope of his implied authority, the author says that "the rule is directly the reverse concerning a particular agent (that is an agent employed specially in one single transaction) for it is the duty of the party dealing with such an one to ascertain the extent of his authority; and if he do not, he must abide the consequences."

The same doctrine has been held by our supreme court, in Paine [illegible] v. Morrison, 3 Iowa, 327, where the court says: "Where parties are sought to be charged for the act of a special, and not a general agent, it must be shown that the act was done within the scope of the agency."

The case of Reed v. Morton, 15 Ind. 345, was an action to recover on the purchase-money [illegible] which had been paid by an agent of the plaintiff [illegible] from one place to another [illegible] to travel, and to agree [illegible] had no power to sell [illegible] thought recover the property from the [illegible] the court [illegible] one of the points: "The [illegible] the agent of whatever description [illegible] the principal, if he agent [illegible] if the principal has never held [illegible] authority whatever [illegible] ing from him to [illegible] of the good faith of the [illegible]

There is no conflict in [illegible] or among other [illegible] appellant was not liable [illegible]

The appellant complains [illegible] receiving [illegible] agent of the appellant [illegible] which the appellant claimed [illegible] his defense. [illegible]

tions, to be general in regard to the particular act of business, it must from necessity be construed according to its real nature and extent; and the other party must act at his own peril, and is bound to inquire into the nature and extent of the authority actually conferred. In such a case, there is no ground to contend that the principal ought to be bound by the acts of the agent, beyond what he has apparently authorized, because he has not misled the confidence of the other party, who has dealt with the agent. * * * The duty of inquiring, then, is incumbent on such party, since the principal has never held the agent out as having any general authority whatsoever in the premises; and, if he trusts without inquiry, he trusts to the good faith of the agent, and not to that of the principal."

And in Smith Mercantile Law, 173, after discussing the powers of a general agent to bind his principal in all matters coming within the general scope of his implied authority, the author says that "the rule is directly the reverse concerning a particular agent, that is, an agent employed specially in one single transaction; for it is the duty of the party dealing with such an one to ascertain the extent of his authority; and if he do not, he must abide the consequences."

The same doctrine has been held by our supreme court, in Pursley v. Morrison, 7 Ind. 356, where the court say: "Where parties are sought to be charged for the act of a special, and not a general agent, it must be shown that the act was done within the scope of the agency."

The case of Reitz v. Martin, 12 Ind. 306, was an action to recover of the purchaser certain personal property which had been sold by an agent of the plaintiff, who had been employed to drive stock from one place to another. The stock became foot-sore and unable to travel, and the agent made the sale. The court held that the agent had no power to sell the stock, and that the owner might recover the property from the purchaser. We quote from the opinion of the court: "The general rule is, that the authority of the agent, of whatever description, must be strictly pursued; otherwise, the principal, if his agent be a special one, will not be bound. And if the principal has never held the agent out as having any general authority whatever in the premises, it is the duty of one purchasing from him to inquire; and if he trusts without inquiry, he trusts to the good faith of the agent, and not of the principal."

There is no conflict in the authorities; and it is manifest that in taking either view of the evidence as to the pretended agency, the appellant was not liable for the unauthorized acts of Munday.

The appellant complains of the ruling of the court in rejecting material and proper evidence offered by him. If Munday was the agent of the appellant in the purchase of the lumber, then the facts which the appellant offered to prove were material in establishing his defense. The evidence shows, as before stated (if it shows any-

thing), that Munday was merely a special or particular agent in this single transaction with the appellee. It also shows that the credit was given to Munday, and not to the appellant; that Munday made two or three partial payments on the lumber; that he did not disclose his character as agent at the time of the purchase; that the appellee looked alone to Munday for his pay, and only ceased his endeavors in that direction after it became manifest that Munday had deceived him, and did not intend to pay him; that the appellee then discovered that the appellant was liable, and addressed him a letter to that effect, and informed the appellant that Munday had acted in bad faith, and he could get nothing out of him. The appellant then offered to prove that before the appellee had written him the letter referred to, and before the appellee had informed him that Munday had failed to pay him for the lumber, the appellant and Munday had made a complete settlement of all accounts and demands between them, which included the lumber from the appellee, when it was found there was a balance due to Munday, which the appellant then paid him, and which closed the account between them; and that the state of their accounts had not since changed. The court did not permit the appellant to prove these facts, and we hold that such ruling was error, and we will let the authorities speak for us.

In 1 Parsons Contracts 62, it is said, that "in the case of a simple contract, an undisclosed principal may show the apparent party was his agent, and he may put himself in the place of his agent, but not so as to affect injuriously the rights of the other party. * * * By parity of reasoning, and undisclosed principal, subsequently discovered, may be made liable on such contract; but, in general, subject to the qualification that the state of the account between the principal and agent is not altered to the detriment of the principal."

The case of Thompson v. Davenport, 9 B. & C. 78, is a case in point, and the doctrine is very ably and fully expounded by Lord Tenterden, who said: "I take it to be a general rule, that if a person sells goods (supposing at the time of the contract he is dealing with a principal), but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterward recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal."

In the same case Bayley, J., said: "If the principal has paid the agent, or if the state of the accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment, or such a state of accounts, would be an answer to the action brought by the seller, where he had looked to the responsibility of the agent. * * * It is said that the

seller ought to have asked the name of the principal, and charged him with the price of the goods. By omitting to do so, he might have lost his right to claim payment from the principal, had the latter paid the agent, or had the state of the accounts between the principal and the agent been such as to make it unjust that the former should be called upon to make the payment. But, in a case circumstanced as this is, where it does not appear but that the man who has had the goods has not paid for them, what is the justice of the case? That he should pay for them to the seller, or to the solvent agent, or to the estate of the insolvent agent, who has made no payment in respect to these goods? The justice of the case is as it seems to me, all on one side, namely, that the seller shall be paid, and the buyer (the principal) shall be the person to pay him, provided he has not paid anybody else."

The case cited is approvingly quoted in Story on Agency, § 291, where, after discussing the general doctrine of the liability of the principal in such cases, it is added, that "there is this qualification, however, annexed to such liability of the principal that nothing has, in the meantime, passed between the principal and the agent to alter the state of their accounts, or otherwise to operate injuriously to the principal, if he has acted in the confidence that inclusive credit was given to the agent; and, moreover, that there has been no laches on the part of the creditor."

That the evidence in the case at bar not only tends to establish, but does conclusively establish the fact that the credit was given to Munday, there can be no question. But if the evidence even tends to that conclusion, it was error for the court to reject the testimony offered, if the authorities cited mean anything. The contract was made with Munday, who did not disclose his agency; no charge was made against the appellant; the appellee and the appellant were entire strangers to each other; the appellee "had great confidence in Munday," whom he had known for a long time, and for a long time he looked to Munday alone for the balance due him; the appellant had never held Munday out as his agent, whereby he could be charged with his acts; and, aside from the testimony of the appellee himself, the legal and natural presumption is that the credit was given to Munday. In support of this position, we refer to the very able American note to the case of Thompson v. Davenport, *supra,* in 2 Smith Lead. Cas. 358, where it is said that, "as a general rule, contracts made by an agent as such, and within the scope of his authority, are binding on the principal, and not on the agent. This results from the natural inference that those who merely stipulate on behalf of the others do not mean to make themselves personally answerable, and that the burden of the contract ought to be borne by him who is to reap the benefit. When, however, goods are bought, or stipulations of any sort made by an agent for an unknown principal, this inference is repelled by the equally natural

presumption that the other party to the transaction relied on the solvency of the agent, whom he knew, rather than on that of the principal, of whose character and condition he was ignorant."

But we refrain from a further citation of authorities. Does the justice of the case at bar require that the appellant shall again pay for what he bought, under a written contract, from Munday? He did no act which was calculated to deceive the appellee, who was a stranger to him. If the appellee was deceived at all, it was by Munday, in whom he had such great confidence, and whom he had favorably known so long. In good faith, the appellant had paid Munday; and upon the theory of the appellee in seeking to hold the appellant liable for a debt which Munday contracted, the court ought to have permitted the appellant to prove the state of the accounts between himself and Munday.

If the court committed no error, then the authorities cited and the reasons of the law are no longer useful, and should be consigned to oblivion and forgetfulness.

It was error to find as the court did and to overrule the motion for a new trial.

The judgment is reversed, at the costs of the appellee, with instructions to grant the motion for a new trial.

J. H. GOULD, for appellant.[1]

[1] *Accord:* Fradley v. Hyland, 37 Fed. 49. On page 50, Wallace, J., said: "The general rule is familiar that, when goods are bought by an agent, who does not at the time disclose that he is acting as agent, the seller, although he has relied solely upon the agent's credit, may, upon discovering the principal, resort to the latter for payment. But the rule which allows the seller to have recourse against an undisclosed principal is subject to the qualification stated by Lord Mansfield in Railton v. Hodgson, 4 Taunt. 576, and by Tenterden, C. J., and Bayley, J., in Thomson v. Davenport, 9 Barn. & C. 78. As stated by Mr. Justice Bayley, it is, 'that the principal shall not be prejudiced by being made personally liable if the justice of the case is that he should not be personally liable. If the principal has paid the agent, or if the state of the accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment or such a state of accounts would be an answer to the action brought by the seller, where he has looked to the responsibility of the agent.' The principal must respond to and may avail himself of a contract made with another by an undisclosed agent. When he seeks to enforce a bargain or purchase made by his agent the rule of law is that, if the agent contracted as for himself, the principal can only claim subject to all equities of the seller against the agent. In the language of Parke, B.: 'He must take the contract subject to all equities, in the same way as if the agent were the sole principal,' (Beckham v. Drake, 9 M. & W. 98) and accordingly subject to any right of set-off on the part of the seller (Borries v. Bank, 29 L. T. N. S. 689). Thus the rights of the principal to enforce, and his liability upon, a contract of sale or purchase made by his agent, without disclosing the fact of the agency, are precisely co-extensive, as regards the other contracting party, if the limitation of his liability is accurately stated in the earlier cases. The qualification of the principal's liability to respond to his agent's contract, as stated in the earlier authorities mentioned, was narrowed by the interpretation adopted in Heald v. Kenworthy, 10 Exch. 739, to the effect that the principal is not discharged from full responsibility

MAPLE v. KENDALL COMPANY.

1883. Supreme Court, Commission of Appeals. January 24, 1883.

Cullen, C. J.—Maple's petition in the proceeding stated that one John D. Gerould, as agent for the Cincinnati, Hamilton and Dayton Railroad Company, at times between January 1, 1877, and April 5, 1878, collected from the [illegible] of the company $30,[illegible] more than was due thereon, and the company [illegible] said agent, "fraudulently overcharged above the regular rates for said freight, all without the knowledge [illegible] said plaintiff by altering a [illegible] of the bills presented to the [illegible] books of said company, all of which was fraudulent [illegible] That he never had any [illegible] said freight [illegible] April, 1878. The [illegible] September [illegible] third defense [illegible] answer [illegible] follows:

[illegible] said defendant further answering says that said plaintiff [illegible] before, to wit, at the September [illegible] 1876, at the [illegible] of [illegible]

MAPLE v. RAILROAD COMPANY.

1883. Supreme Court Commission of Ohio. 40 Ohio St. 313.

Granger, C. J.—Maple's petition in the common pleas averred that one John D. Gennett, as agent for the Cincinnati, Hamilton and Dayton Railroad Company, at times between January 14, 1870, and April 5, 1876, collected from him, on freight bills of the company, $307.80 more than was due thereon; that the company, by said agent, "fraudulently overcharged above the regular and special rates for said freight, all without the knowledge and consent of the said plaintiff, by adding a percentage of pounds of weight to the bills presented to the plaintiff, in excess of the true weights upon the books of said company, all of which was fraudulently done." And, "that he never had any knowledge of" said fraud "until the month of April, 1876." The action was begun September 30th, 1878. The third defense in the answer as amended read as follows:

3. Said defendant further answering says that said plaintiff heretofore, to wit, at the September terms, 1876, of the court of com-

unless he has been led by the conduct of the seller to make payment to or settle with the agent; and the doctrine of this case has been reiterated in many subsequent cases, both in England and in this country, where the agent did not contract as for himself, but as a broker, or otherwise as representing an undisclosed principal. One of the more recent English cases of this class is Davison v. Donaldson, 9 Q. B. Div. 623. But, as is shown in Armstrong v. Stokes, L. R. 7 Q. B. 599, the version of Heald v. Kenworthy, while a correct interpretation of the rule of the principal's liability, when applied to cases in which the seller deals with the agent relying upon the existence of an undisclosed principal, is not to be applied in those in which the seller has given credit solely to the agent, supposing him to be the principal. This case decides that the principal is not liable when the seller has dealt with the agent supposing him to be the principal, if he has in good faith paid the agent at a time when the seller still gave credit to the agent, and knew of no one else. See also, Irvine v. Watson, L. R. 5 Q. B. D. 414." In Irvine v. Watson the court discredited Armstrong v. Stokes, *supra*, and affirmed the doctrine of Heald v. Kenworthy, *supra*. On page 417 of Irvine v. Watson, Bramwell, L. J., says: "It is true that in Thompson v. Davenport both Lord Tenterden and Bayley, J., suggest in the widest terms that a seller is not entitled to sue the undisclosed principal on discovering him, if in the meantime the state of account between the principal and the agent has been altered to the prejudice of the principal. But it is impossible to construe the *dicta* of those learned judges in that case literally; it would operate most unjustly to the vendor if we did. I think the judges who uttered them did not intend a strictly literal interpretation to be put on their words. But whether they did or no, the opinion of Parke, B., in Heald v. Kenworthy seems to me preferable; it is this, that 'If the conduct of the seller would make it unjust for him to call upon the buyer for the money, as for example, where the principal is induced by the conduct of the seller to pay his agent the money on the faith that the agent and seller have come to settlement on the matter, or if any representation to that effect is made by the seller, either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal.' That is in my judgment a much more accurate statement of the law."

mon pleas of Putnam county, Ohio, recovered a judgment against the said J. D. Gennett upon proceedings thereinbefore had in said court in a certain action wherein said Simon Maple was plaintiff and J. D. Gennett was defendant, and which said judgment was for the sum of $307.80 principal and ——— dollars interest and costs of suit, and said defendant avers that said judgment so rendered was for the same subject-matter and cause of action as the first cause of action in the plaintiff's petition herein set forth. That said judgment remains in full force and effect, wherefore said plaintiff has no right to have or maintain his suit against the said defendant upon said first cause of action.[1] * * *

The third defense presents an interesting question. In presenting and collecting the freight bills Gennett acted "within the scope of his authority." The company held him out to its customers as its representative in that matter. So long as the bills he presented did not by the weights of prices noted therein furnish fair reason to question their truth, a customer of the company had full right to rely upon them as being the demands of the company upon him. On these pleadings we must presume that the bills gave no indication of the fraud.

This defense admits that the fraud was the act of the company by its agent. If they conspired together to commit the fraud they were joint tort feasors; could be sued jointly or severally. In such a case a judgment, without satisfaction, against one, could not be pleaded in bar by the other. Is the rule different because the company was ignorant of the fraud, and is liable only because Gennett was acting within the scope of his authority? Was Maple bound to elect between agent and principal, and having carried his election to judgment against Gennett did he thereby release the company? No case precisely in point has been cited and we have found none. We are referred by counsel for the company to Priestly v. Fernie, 3 Hurlstone & Coltman Ex. 997; Patterson v. Gandesquin, 15 East 62; Jones v. Ætna Ins. Co., 14 Conn. 501; Meeker v. Claghorn, 44 N. Y. 359; Seeley *et al.* v. Ryan & Co., 2 Cin. Sup. Ct. 158, and a case in 1 Disney. The case in Disney gives no aid here. The one in Cin. Rep. decides that the principal and agent were not *jointly* liable in that suit, and required the plaintiff to elect which one he would pursue in that action, so that the other might be stricken out. The other cases cited were suits upon contracts so made by the agent that the contractee might elect whether the agent, or the principal, should be considered the party with whom he had a contract; and the courts held that, having carried the election as far as a judgment, the creditor had fixed the contract, and the parties thereto, permanently. Bramwell, J., in the case in 3 H. & C. 997, places his decision upon the ground just stated and upon the addi-

[1] A portion of the opinion is omitted.

tional consideration that the judgment against the agent altered the situation of the principal. But Gennett has no right to sue the company because of Maple's judgment against him. He can base no action upon the result of his own wilful fraud.

We are also cited to Wharton on Agency and Agents, § 473. The author cites Priestly v. Fernie, above referred to, for the rule he states, but adds "there is much reason for the position that the mere taking judgment against the agent under such circumstances" (as in the case cited) "should not, when the judgment is unsatisfied, extinguish the debt." The case before us presents stronger reasons than the one referred to by Wharton for holding that the liability of the principal continues. Unless Maple's recovery against Gennett affected the rights of the railway company, we can see no reason for holding that recovery a bar in its favor. So long as Gennett wholly fails to pay that judgment; so long as Maple makes no collection thereon, Gennett must remain liable to make good to the company the damage occasioned by his misconduct as its agent. Nothing but satisfaction by him, or by his property; or the statute of limitations, can release him without the consent of his principal. We hold that the demurrer to this defense should have been sus tained.[2]

GREENBURG v. PALMIERI.

1904. Supreme Court of New Jersey. 71 N. J. L. 83.

Van Syckel, J.—This is a suit, instituted in the second district court of Newark, against a wife for supplies purchased by her husband for horses owned by her. The plaintiff, before this suit was brought, sued the husband and recovered a judgment for the same claim.

After judgment against the husband, the plaintiff learned that the husband, in making the purchases, acted as the agent of his wife in her business, and then this suit was commenced.

From the judgment recovered against the wife the case is in this court by appeal. In Elliott v. Bodine, 30 Vroom 567, Judge Nixon, in delivering the opinion of the court of last resort, says: "Where credit is given to an agent, the fact of agency being unknown at the

[2] *Accord:* Beymer v. Bonsall, 79 Pa. St. 298; Tew v. Wolfsohn, 77 App. Div. (N. Y.) 454. On page 457 of the latter case Laughlin, J., says: "I see no sound basis for the application of the doctrine of election in cases of this character until there has been not only a recovery against either the principal or agent, but a satisfaction of the judgment as well."

Contra: Priestly v. Fernie, 3 H. & C. 977; Kingsley v. Davis, 104 Mass. 178; Codd v. Parker, 97 Md. 319.

time, the party giving credit may elect which he will hold responsible, the principal or the agent; and that a husband may act as the agent of his wife."

In Yates v. Repetto, 36 Vroom 294, Judge Adams, in expressing the views of the court of errors and appeals, says: "The authorities are uniform in maintaining the doctrine that when the principal is unknown to the vendor at the time of the sale, he may, upon discovering the principal, resort to him or to the agent with whom he dealt at his election."

To make an election binding, the party electing must have information of the name of the principal in addition to the fact of the agency, for in the absence of such knowledge there could not be an election.

In this case the plaintiff had notice neither of the agency nor of the name of the principal.

If the plaintiff sues after he is advised of the agency, it is an election from which he cannot recede;[1] but where, as in this case, he recovers a judgment against the agent when he is in ignorance of the existence of a principal, an action will lie against the principal unless he discharges the judgment against the agent. Story Ag., § 296; Mech. Ag., §§ 695, 700; Beymer v. Bosnall, 79 Pa. St. 298.

The judgment below should be affirmed, with costs.

BARRELL et al. v. NEWBY.

1904. Circuit Court of Appeals, Seventh Circuit.
127 Fed. Rep. 656.

Baker, J.—If a merchant parts with his goods to one whom he knows to be an agent, fails to require a disclosure of the principal, and charges the account to the agent, ordinarily the question might be raised whether the merchant has not deliberately chosen the agent for his debtor, and thereby precluded himself from afterwards pursuing the principal. Patapsco Ins. Co. v. Smith, 6 Har. & J. (Md.) 166, 14 Am. Dec. 268; Ins. Co. of Pa. v. Smith, 3 Whart. 520. But the ninth averment of the answer, to the effect that, though

[1] *Contra:* Ferry v. Moore, 18 Ill. App. 135.
See Raymond v. Crown & Eagle Mills, 2 Met. (Mass.) 319.
"Knowledge of the right to recover from the principal is essential, before suit against the agent may be regarded as an election to look to the latter alone for payment; without knowing who the principal was, or the fact of agency, an intelligent election was impossible. To constitute an election, there must be something to indicate an intention, with full knowledge of the facts, to give sole credit to the agent and to abandon all claim against the principal." Ladd, J., in Smith Groc. Co. v. Potthast, 109 Ia. 413, 418.

plaintiffs knew Todd was acting as an agent for an undisclosed principal, the custom of the trade authorized them to look to him in the first instance, prevents defendant from claiming that the suggested question is available here, and leaves plaintiffs in a position as advantageous as that of a merchant who sells on credit in the belief that the purchaser is acting for himself.

Plaintiffs' contention is that such a seller, on discovering the principal, is never required to elect whom he will consider his debtor; that he has concurrent rights of action against both; and that nothing short of a satisfaction by one, or at least a judgment against one (according to English cases, which seem to be based on the English rulings that a judgment against one joint tort feasor is a satisfaction as to all), will exhaust his right to pursue the other. In support of this proposition, and of collateral arguments, plaintiffs adduce many cases.

On the other hand, defendant insists that such a seller, on discovering the principal, may take a reasonable time to investigate and compare the standings of principal and agent, and thereupon must choose whom he will hold as his debtor and abandon his right to choose the other; and that he cannot hold both. And defendant cites numerous authorities as a basis for his argument.

If Todd, when placing the order with plaintiffs, had informed them that he was simply acting as agent for defendant, plaintiffs could have accepted the order as defendant's, and Todd would have incurred no liability; or they could have refused to take defendant as their debtor and have informed Todd that they would look to him, and, if Todd had made no objection, he would have been bound and defendant not; but, in dealing with the agent of a disclosed principal, they could not have held both without an agreement to that effect. It is true that plaintiffs could have declined to take the order except on the joint and several contract of Todd and defendant; but there is no pretense of such a contract, for the averment of the complaint is that they accepted and acted on defendant's order; and the bare transaction of a merchant's selling to the agent of a known principal does not establish a joint and several, or several liability of agent and principal, but evidences only one contract, one liability, one credit, one debtor, whose indentity is determined by the seller's election, which he must make at the time.

Respecting election, what difference in reason does it make whether the seller ascertains the identity of the principal before he delivers the goods and extends the credit, or after delivery but before he seeks to exact payment? In the first place, we understand plaintiffs to agree that the seller must elect. In the second, the seller manifestly has passed on the credit of but a single person. If, before payment, he finds out who the principal is, it is just that he should be able to hold the agent, for the agent offered his own credit and it was accepted. It is also just that the seller should be permitted to

abandon the right that he had in the first instance to pursue the agent, and to hold the principal, for the contract of purchase was in reality the principal's. When, after delivery, but before seeking to exact payment, the seller learns the identity of the principal, he has an opportunity for investigating and comparing the standings of agent and principal, just as he would have had if he had known the principal before delivery. We apprehend no rule of law that warrants the conclusion that the seller must elect in the one case and not in the other. We perceive no solid reason why the law, in behalf of the seller, who in both cases has really contemplated and contracted for a single credit only, should in the one case more than the other create a contract under which the agent and principal stand as joint and several, or several, obligors. The decision in Beymer v. Bonsall, 79 Pa. 298, and expressions in some other cases, to the effect that one who sells to the agent of an undisclosed principal may, on discovery of the principal, pursue either or both until he has obtained satisfaction (as though they were joint tort feasors), do not meet our approval.

Objection is made to the answer on the ground that the issue of election or no election is one that must be determined by the jury from the evidence and the instructions of the court. If it were permissible for a defendant to tender the issue by the naked averment that plaintiff elected to hold the contract as the agent's, and if, under such an answer, the uncontradicted evidence establish acts of the plaintiff from which but one conclusion could legally be deduced, then the court would have the right to direct the verdict; and, if the same acts be set forth in an answer and confessed, we think the court may likewise draw the conclusion.

Do plaintiffs' acts constitute an election? In two instances plaintiffs procured conditional executions in advance on their solemn declaration to the courts that the broken contract was Todd's—not Todd's and the defendant's, but Todd's. In another instance plaintiffs acted as court and sheriff, and turned Todd's money into their own till. Now they declare with equal solemnity that the same broken contract was defendant's—not defendant's and Todd's, but defendant's. We do not mean to assert that the mere bringing of an action against Todd would be inconsistent with their proceeding later against defendant. If the action were begun before they learned of defendant's principalship, certainly they should be permitted to dismiss, and sue defendant. And if they proceeded against Todd by reason of mistake or fraud, or the like, they might seek relief from their act, give up the chase they had entered upon, and return to the cross-roads. But here, under no misapprehension of comparative standings, but with full knowledge of the whole truth of the situation, plaintiffs not merely seized Todd's money on the basis that the contract was his, but they insist upon their right to retain it, and to say that the contract is Todd's, throughout

the facts in which they would not be [illegible]. To [illegible] but one interrogatory can be given in this manner.

Plaintiff's charge that, [illegible] the answer [illegible] was [illegible] charged with. [illegible] may [illegible] it appears [illegible] no hardship to require [illegible] Then [illegible] plaintiffs are [illegible] remedies or of defendant [illegible] of the defendant, but is founded on a [illegible] plaintiff to settle with the [illegible] issue grows out of a consideration of [illegible] are distinct defenses, and he who pleads [illegible] it would be the mistake to [illegible] if he shows that the plaintiff [illegible] of two courses, has taken one [illegible] him.[1]

The judgment is affirmed.

Section 3.—Liability of Third Party to Agent.

CARTER v. SOUTHERN RAILWAY COMPANY

1906. Supreme Court of Georgia. 125 Ga. 351.

Cobb, J.—Carter sued the railroad company for damages resulting from the breach of a contract which [illegible] entered into with the plaintiff. [illegible] in evidence a receipt signed [illegible] the following is a copy: [illegible] articles in apparent good order [illegible] copies attached to be transported [illegible] setting forth the articles above [illegible] from the point from which [illegible] twenty-four hours after [illegible] new and in good condition [illegible]

[1] "Election requires a deliberate choice between [illegible] to compel one [illegible] or a particular remedy [illegible] Civil Code, § 5 [illegible] 2 S. E. 1. Columbus Land Co. [illegible]

See decisions of [illegible] Ga. [illegible] Ga. [illegible] See also Miller Veneer Co. [illegible] W. [illegible] 58.

See note to [illegible] Law Rev. [illegible] Kennedy against Agent in Undisclosed Principal.

the time in which they assert that the contract is defendant's. To our minds but one interpretation can be given to this conduct.

Plaintiffs urge that, inasmuch as the answer fails to aver that defendant settled with Todd before they sued defendant, it would be no hardship to require defendant to pay them. It seems to us that plaintiffs are confusing election with equitable estoppel. Election, whether of remedies or of defendants, has no regard to the situation of the defendant, but is founded on a public policy that forbids a plaintiff to trifle with the courts. Equitable estoppel, on the other hand, grows out of a consideration of the defendant's state. They are distinct defenses, and he who pleads election need not show that it would be inequitable to permit the plaintiff to recover; it is enough if he shows that the plaintiff, having by law the right to take either of two courses, has taken and holds to the one that leads away from him.[1]

The judgment is affirmed.

Section 3.—Liability of Third Party to Agent.

CARTER v. SOUTHERN RAILWAY COMPANY.

1900. Supreme Court of Georgia. 111 Ga. 38.

Cobb, J.—Carter sued the railroad company for damages resulting from the breach of a contract of shipment which the defendant had entered into with the plaintiff. On the trial the plaintiff introduced in evidence a receipt signed by an agent of the defendant, of which the following is a copy: "Received from W. R. Carter the following articles in apparent good order, contents and value unknown, as per coupon attached, to be transported to W. R. Carter, McRae, Ga.," setting forth the articles shipped. The plaintiff testified that the distance from the point from which the goods were shipped to their destination was thirty miles; that they should have been delivered in twenty-four hours, which was a reasonable time; that the goods were new and in good condition when delivered to the defendant; that

[1] "Election implies a deliberate intention,—a definite purpose to accept one debtor, or a particular remedy, in lieu of another." Wallace, Cir. J., in Atlas S. S. Co. v. Colombian Land Co., 102 Fed. Rep. 358, 360.

See discussion of doctrine of election in Hoffman v. Anderson, 112 Ky. 893. See also Miss. Valley Const. Co. v. Abeles (Ark.), 112 S. W. Rep. 894, 896.

See note in 17 Harv. Law Rev. 414, entitled "Election of Remedy against Agent or Undisclosed Principal."

they were not delivered by it at the point to which they were shipped until twenty-five days had elapsed from the time they were delivered to the defendant; and that when delivered some of the goods were in such a damaged condition that they were rendered worthless, and all of them were more or less damaged. Just before leaving the witness-stand the plaintiff stated: "The goods belonged to my wife, Mary Carter. She owned them, and I had the goods in my charge as her agent." There being no further evidence for the plaintiff, the court, upon motion of defendant's counsel, granted a non-suit on the ground that the goods alleged to have been damaged did not belong to the plaintiff but to his wife. To this judgment the plaintiff excepted. The question, therefore, presented for decision is whether or not the plaintiff could maintain the action in his own name. It is an elementary principle that an action on a contract must be brought in the name of the party in whom the legal interest is vested; and that the legal interest in a contract is in the person to whom the promise is made and from whom the consideration passes. 15 Enc. P. & P. 499, 500; Civil Code, § 4939. In the present case the plaintiff, although in reality he occupied the relation of agent of his wife to take charge of the goods shipped, was named both as the consignor and consignee in the contract of shipment, with no reference whatever therein to the fact of his agency. Under such circumstances the action could be maintained in his own name. Generally, it is true, an agent has no right of action upon a contract made by him in behalf of his principal, but he has a right of action in his own name "where the contract is made with the agent in his individual name, though his agency be known." Civil Code, § 3037 (3). Certainly the action could be maintained where the fact of agency and the name of the principal are both concealed by the agent. In such a case the agent is, in contemplation of law, the real contracting party, to whom the promise of the other party was made and who is entitled to enforce it. Mechem Ag., § 755; Story Ag. (9th ed.), § 393.

But the plaintiff was the consignor of the goods shipped. The contract was made with him, and he is primarily liable for the transportation charges. The carrier dealt with him as the owner of the goods, and could not, in an action by the plaintiff to recover the goods, dispute his title, unless the title of the real owner was sought to be enforced against the carrier. Civil Code, § 2286. In the case of Haas v. Railroad Company, 81 Ga. 792, suit was brought by Haas upon a contract or bill of lading made by the defendant with one Ayres. It was held that "the bill of lading for the flour not having been indorsed to plaintiff by the party in whose favor it was issued, the former could not maintain an action against the company upon it." It appears from the record in that case that Ayres was the consignor and Haas the consignee. The present Chief Justice says in

the opinion: "The record does not show that this bill of lading was assigned or indorsed by Ayres to Haas. This being true, Haas, under our code, could not bring suit on the contract made between the railroad company and Ayres." The courts of both this country and England are now, with a few exceptions, all agreed that where the consignor makes the contract of shipment with the carrier, he may bring an action for loss of or injury to the consignment, although he may not be the actual owner of the property. In such a case the privity of contract between the carrier and consignor is a sufficient foundation on which to base the action. It is also well settled by the authorities that where a consignor, who is himself not the real owner, recovers damages from the carrier for a breach of the contract of carriage, the recovery enures to the benefit of the owner, and the consignor is regarded simply as the trustee of an express trust. It would seem to follow necessarily from this, that a recovery by the consignor for a breach of the contract would be a bar to an action by the owner in tort for the injury done him. The English courts have, so far as we are aware, uniformly adhered to the rule, that an action for a breach of a contract of carriage made with the consignor may be maintained by him. In Davis v. James, 5 Burr. 2680, a decision rendered in 1770, it was held that "Action lies against carrier in name of consignor, who agreed with him and was to pay him." The question was squarely made in that case, and the court reached the conclusion above indicated. Lord Mansfield said, in the opinion which he rendered in that case: "This is an action upon the agreement between the plaintiffs and the carrier. The plaintiffs were to pay him. Therefore the action is properly brought by the persons who agreed with him and were to pay him. "This decision, as above stated, was uniformly adhered to by the English courts, and there being in this state no statute law to conflict with the rule therein announced, it became, by force of our adopting statute, the law of this state."

In Moore v. Wilson, 1 Term. Rep. 659, the doctrine announced in the case just referred to was reaffirmed; and the court held further that it was immaterial whether the hire was to be paid by the consignor or the consignee, as the former, was, in law, liable to the carrier for the hire. In Joseph v. Knox, 3 Camp. 320, it was held that an action by the consignor would lie. The opinion was rendered by Lord Ellenborough, who said: "I am of opinion that this action well lies. There is a privity of contract established between these parties by means of the bill of lading. That states that the goods were shipped by the plaintiffs, and that the freight for them was paid by the plaintiffs in London. To the plaintiffs, therefore, from whom the consideration moves, and to whom the promise is made, the defendant is liable for the non-delivery of the goods. After such a bill of lading has been signed by his agent, he cannot say to the shipper

they have no interest in the goods, and are not damnified by his breach of contract. I think the plaintiffs are entitled to recover the value of the goods, and they will hold the sum recovered as trustees for the real owner." In Dunlop v. Lambert, 6 Cl. & F. *600, the House of Lords held: "Though, generally speaking, where there is a delivery to a carrier to deliver to a consignee, the latter is the proper person to bring the action against the carrier, yet if the consignor make a special contract with the carrier, such contract supersedes the necessity of showing the ownership in the goods, and the consignor may maintain the action, though the goods may be the property of the consignee." The "special contract" referred to in the above quotation was simply a bill of lading declaring that the goods were to be delivered to Matthew Robson, "freight for the said goods being paid by William Dunlop & Co.," the plaintiffs. The case of Dawes v. Peck, 8 Term Rep. 330, is sometimes cited as authority for a contrary rule. That case is thus commented upon and distinguished by Judge Turley in the case of Carter v. Graves, 9 Yerger 445, 450: In that case "an action on the case was brought by a consignor against a common carrier for not safely carrying according to his undertaking, in consideration of a certain hire and reward to be therefor paid, two casks of gin from London to one Thomas Ady, at Hillmorton, in Warwickshire. The court determined that, if a consignor of goods deliver them to a particular carrier by the order of a consignee, and they be afterwards lost, the consignor cannot maintain an action against the carrier and that the action can only be maintained by the consignee. In this case there is no contract with the consignor by the carrier for the delivery of the articles; the freight is not paid by him; the property is delivered to a carrier specified by the consignee; and, more than all, the court, in the opinions delivered, refer to the cases of Davis and Jordan, 5 Burr. 2680, and Moore and others v. Wilson, 1 Term Rep. 659, and recognize them as sound authority."

A leading American case is Blanchard v. Page, 8 Gray 281, where, after an elaborate review of the authorities, Chief Justice Shaw reached the conclusion that "the shipper named in a bill of lading may sue the carrier for an injury to the goods, although he has no property, general or special, therein." The reasoning upon which this ruling is based seems to be unanswerable, and the decision ought to be accepted as decisive of this question. It must not be lost sight of that the present action was based upon a contract. If the action had been based upon the tort of the carrier in delivering the goods in a damaged condition, then a question entirely different from that involved in the present case would be raised. In such a case it would seem that the right of action is to recover for the injury in the interest or right in the property, and the shipper, if not the owner, could not bring such an action. The distinction between such a case and

as the case proves was owned by [illegible] v. Railroad Company, 132 Mass. 545, where it was ruled in effect that in order to authorize an action by the consignor, where not the owner of the goods, there need be no express contract between him and the carrier, but the action may be maintained upon the contract implied from the delivery and receipt of the goods for carriage. And even if a demand has been begun by the consignee, and then the consignor will take the suit recovered in trust for the consignee. In Carter v. Graves, 9 Yerg. 445 it was held: "A consignor cannot maintain an action in the case for the loss or injury of the property consigned, without showing that he has a general or special right to the property, or may in all cases maintain an action of assumpsit upon a contract implied the property safely to be given over the same, and pay the money bound for, the consignation." In Cooper v. Railway Co., 82 Wis. 81, 91, it was said: "The consignee is a party to the contract, and it does not lie with the carrier, who made the contract with him, to say, upon a breach of it, that he is not entitled to recover the damages, unless it be shown that the consignee objects; for, until that, it will be presumed that the action was commenced and is prosecuted with the knowledge and consent of the consignee, and for his benefit. The consignor or shipper is by operation of the rule, regarded as a trustee of an express trust, like a factor or other mercantile agent who contracts in his own name on behalf of his principal." Another well-considered case, in which an elaborate review of the authorities is made, is Southern Express Company v. Craft, 79 Miss. 460. In Great Western Railway Company v. McComas, 33 Ill. 185, it was ruled: "Where goods are shipped over a railroad for a consignee, the consignor may sue for their [illegible] because he is not a bailee. He has such a special property [illegible] as will support the right of action. So may the consignee, because he has a special property. If it was ruled further in this case that where the consignee first obtains damages, it will be a bar to the claim of the others.

We have not undertaken to [illegible] upon this question. Many of these cases [illegible] all, or some of the decisions above referred to [illegible] made in the present case [illegible] 161; St. Louis v. Cobb, 72 [illegible] 74 Mo. 530; Atchison v. Railway [illegible] Shedine, 12 Kan. 626; [illegible] 52 Ala. 161; Mo. Pac. Ry. [illegible] Co. v. Scott, 4 Tex. Civ. [illegible] v. Emrich, 24 Ill. App. 247; [illegible] 61 Ill. 263; Prill v. Railway [illegible] 32 Wis. 624; Moran v.

they have no interest in the goods, and are not dernalled by his assent to contract. Hence the plaintiffs are entitled to recover the value of the goods, and may well hold the sum recovered as trustees for the real owner." In Dudley v. Lambert, 1 Str. 613, 1690, the House of Lords held: "Factors generally speaking, where there is a delivery to a carrier by order of, or to a person who, the factor is the proper person to bring an action against the carrier; but if the consignee make a special contract with the carrier, such contract supersedes the necessity of bringing the action in the factor's name, and the consignor only can maintain the action. Though the goods may be the property of the consignee [the "special contract" referred to in the above quotation was a bill of lading declaring that the goods were to be delivered to consignee Robson "freight for the said goods being paid by Wolfenden Sharpe & Co., the plaintiffs. The case of Fowler v. Hollins, L. R. 7 Q. B. 330, is sometimes cited as authority for a contrary rule. That case is thus examined, upon and distinguished by Judge Gray in the case of Cutter v. Powers, 9 Yerger 548: "In that case an action on the case was brought by a consignee against a common carrier for not safely carrying according to the contract the plaintiff's property, consisting of a certain note and reward to be thereafter paid to the consignee from London to the Thomas Ady, at Gibraltar, or Tarragona. The court determined that, if a consignee of goods [sent to a factor] by order of a consignor, and not forwarded by the consignee, cannot maintain an action against the carrier, and that the person can only be considered as the consignee for the delivery of the articles; the freight is not paid [the property is intrusted to a carrier specified by the consignor], and [see 30, the court, in the opinions delivered, reviews the cases of Dyer and Jordan, 5 Burr. 2785, and Moore and Wilkinson, 1 East, 659, and recognize them as sound decisions.

A leading American case is Coggs v. Grey, 2 Gray 281, where, after an exhaustive review of the authorities, Chief Justice Shaw reached the conclusion that a shipper named in a bill of lading may sue the carrier for loss of the goods, although he has no property, general or special, in the goods, the reasoning upon which this ruling is based [illegible] and the decision ought to be accepted as [illegible]. It must not be lost sight of that the present [illegible] action [illegible]. If the action had been based upon the [illegible] carrier in delivering the goods in a damaged condition [illegible] different from that involved in the present case would be [illegible] in such a case it would seem that the right of action is in the owner of the interest or right in the property and the shipper, if not the owner, could not bring such an action. The [illegible] between such a case and

one like the present was pointed out in Finn v. Railroad Company, 112 Mass. 524, where it was ruled, in effect, that in order to authorize an action by the consignor, who is not the owner of the goods, there need be no express contract between him and the carrier, but that the action may be maintained upon the contract implied from the delivery and receipt of the goods for carriage, if no action *ex delicto* has been begun by the consignee; and that the consignor will hold the sum recovered in trust for the consignee. In Carter v. Graves, 9 Yerg. 445, it was held: "A consignor cannot maintain an action on the case for the loss or injury of the property consigned, without showing that he has a general or special right thereto, but he may in all cases maintain an action of assumpsit upon a contract to deliver the property safely, he having made the same, and paid, or become bound for, the consideration." In Hooper v. Railway Company, 27 Wis. 81, 91, it was said: "The shipper is a party in interest to the contract, and it does not lie with the carrier, who made the contract with him, to say, upon a breach of it, that he is not entitled to recover the damages, unless it be shown that the consignee objects; for, without that, it will be presumed that the action was commenced and is prosecuted with the knowledge and consent of the consignee, and for his benefit. The consignor or shipper is, by operation of the rule, regarded as a trustee of an express trust, like a factor or other mercantile agent who contracts in his own name on behalf of his principal." Another well-considered case, in which an elaborate review of the authorities is made, is Southern Express Company v. Craft, 49 Miss. 480. In Great Western Railroad Company v. McComas, 33 Ill. 185, it was ruled: "Where goods are shipped upon a railroad for transportation, the consignor may sue for their non-delivery, though he be but a bailee. He has such a special property in the goods as to give him a right of action. So may the real owner sue, and so may the consignee. It was ruled further in that case that whichever of these three first obtains damages, it will be in full satisfaction of the claims of the others.

We have not undertaken to collate here all of the cases bearing upon this question. Many of them, perhaps nearly all, are cited in the decisions above referred to. The following also support the ruling made in the present case: Cobb v. Railroad Company, 38 Iowa 601 (8); Dows v. Cobb, 12 Barb. 310; Harvey v. Railroad Company, 74 Mo. 539; Atchison v. Railway Company, 80 Mo. 213; Moore v. Sheridine, 11 Harr. & McH. 453; Southern Express Co. v. Caperton, 44 Ala. 101; Mo. Pac. Rwy. Co. v. Smith, 84 Tex. 348; Mo. Pac. Rwy. Co. v. Scott, 4 Tex. Civ. App. 76; Ohio & Miss. Railroad Co. v. Emrich, 24 Ill. App. 245; Northern Line Packet Co. v. Shearer, 61 Ill. 263; Brill v. Railway Co., 20 U. C. C. P. 440; Moran v.

Packet Co., 35 Me. 55; Cantrell v. Pacific Express Co., 58 Ark. 487; Goodwyn v. Dougless, Cheeves (S. C.) 174; 3 Enc. P. & P. 826; Hutchinson Car., § 724 et seq.; Parks v. Railway Co. (Tex.), 30 S. W. 708; Galveston Ry. Co. v. Barnett (Tex.), 26 S. W. 782; Davis v. Jacksonville South-Eastern Line (Mo.), 28 S. W. 965. There are a few cases which seem to hold that the sole right of action against a carrier for loss of or injury to goods as in the consignee, notwithstanding a contract of carriage was made with the consignor. It would not be profitable to attempt to reconcile these decisions. Some of them, however, will be found upon examination to refer to actions ex delicto brought by the consignee as the real owner of the goods. Those which do hold that the consignor cannot maintain an action for a breach of contract made by the carrier with him are, as has been seen above, against both principle and the great weight of authority, and ought to be disregarded. So far, however, as the present case is concerned, the plaintiff was both consignor and consignee, and the real owner was a party entirely unknown in the transaction. We prefer, however, to place our decision upon the ground that as the plaintiff was the agent of the real owner of the goods and had charge of the same, he was authorized to enter into a contract of shipment with the carrier; and that having entered into this contract, the legal interest therein was vested in him, and he could sue for its breach. The decision of this court in Lockhart v. Railroad Co., 73 Ga. 472, does not conflict with anything ruled in the present case. The plaintiff in that case had no contract with the carrier, and no interest whatever in the property.

It was contended by counsel for defendant in error that the plaintiff in the present action failed to make out a *prima facie* case of liability on the part of the defendant for injury to the goods, and that, this being so, even if the court erred in placing his decision granting a non-suit on the ground indicated in the order, the judgment should be affirmed, as the right result was reached, though the wrong reason may have been given for it. We think the plaintiff did make out a *prima facie* case of liability; and consequently the judgment of non-suit was in any view of the case erroneous, and a trial upon the merits should be had.

Judgment reversed. All concurring, except Fish, J., absent.[1]

[1] See also Georgia, etc., Ry. Co. v. Marchman, 121 Ga. 235.

"An agent may sue in his own name: First, When the contract is in writing and is expressly made with him, although he may have been known to act as agent; Secondly, When the agent is the only known or ostensible principal, and is, therefore, in contemplation of law, the real contracting party; Thirdly, When, by the usage of trade, he is authorized to act as owner, or as a principal contracting party, notwithstanding his well-known position as agent only. But this right of an agent to bring an action, in certain cases, in his own name, is subordinate to the rights of the principal, who may, unless in particular cases,

COLBURN v. PHILLIPS AND OTHERS.

1859. SUPREME JUDICIAL COURT OF MASSACHUSETTS. 13 Gray 64.

Action of contract upon the following agreement: "Salem, Oct. 6, 1853. Agreed with Jesse Colburn at Tyngsborough or ship say two hundred tons of rough stone, averaging from one to two tons each, from Phillips' Wharf, to the port of Norfolk, Va., at the rate of $1.75 per ton of fourteen cubic feet, and as soon after they are received as a vessel can be procured, the measurement to be made up from the marks upon each piece.

FOLSOM, GOODRICH & BOWDEN.

"It is understood that Mr. Colburn shall not be liable for any expenses at Salem, except the charge of freight above specified.

F., G. & B.

"To be delivered at Norfolk, Va., to the order of Gault & Brother.

F., G. & B."

The substance of the declaration and of the demurrer thereto, upon which the case was argued in writing, are stated in the opinion.

HOAR, J.—The plaintiff made a written contract with the defendants to ship two hundred tons of stone from Phillips' Wharf in Salem to Norfolk, Va., at the rate of $1.75 a ton, as soon after they were received at a vessel could be procured, to be delivered in Norfolk, to the order of Gault & Brother; the plaintiff not to be liable for any expenses at Salem, except the freight as above specified. The plaintiff in his declaration alleges in substance that he made the contract on behalf and for the benefit of the firm of Gault & Brother, and their assigns; Gault & Clarke; that he delivered the stone at Phillips' Wharf; but that the defendants did not pay him at the price agreed, but at a higher price; and that Gault & Clarke paid the higher rate, under protest, on a part of the stone, and on the rest were compelled to pay it by process of the court of admiralty, with divers costs, expenses and counsel fees.

The defendants filed an answer, denying some of the material allegations of the declaration; and upon their answer issue is joined, which now comes before us for adjudication.

Four causes of demurrer are assigned. 1. That by the plaintiff's own showing the only cause of action belongs to Gault & Clarke, and not to the plaintiff. In support of this it has been argued on the

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where the agent has a lien or special interest in the goods, being [illegible] Otis, assignee, &c., v. Gardner, 1 Vt. 282. Hunt v. Bass, 11 Ind. 265, 270.

In Miller v. State Bank of Ireland, 20 Mich. 142, it was held that one who signed a note as agent for an undisclosed principal was liable on it, although the payee knew that he was acting as agent.

market Co., 15 Ill. 550; Cantrell v. Pacific Express Co., 55 Ark. 487; Goodwin v. Douglas Co., 18 C. C. A. 174, 71 Fed. 325; Hutchinson Co. v. Texas & Pacific R. Co., (Tex.) 30 S. W. 598; Galveston, H. & S. A. R. Co. v. Barnett, (Tex. Civ. App.) 30 S. W. 782; Davis v. Jacksonville Street Ry. Co., 104 Ga. 495. There are a few cases which seem to hold that the sole cause of action against a carrier for loss of or injury to goods is in the consignee, notwithstanding a contract of carriage was made with the consignor. It would not be profitable to attempt to reconcile these decisions. Some of them, however, are based upon statutes which refer to actions ex delicto brought by the consignee as the owner of the goods. Those which do not rest upon the consignee's ownership maintain an action for a breach of contract made by the consignor with him or, as has been said, upon the principle and the great weight of authority are reconcilable. So far, however, as the present case is concerned, the plaintiff was both consignor and consignee, and the defendant was entirely unknown in the transaction. The plaintiff sues upon the ground that as the plaintiff was owner of the goods at the time of the delivery of the goods and had charge of them, he was authorized to enter into a contract of shipment, and that having entered into this contract, the duty to him, and he could sue for its breach. The cases in Rockport v. Railroad Co., 73 Mo. 468, with unanimity ruled in the present case. The plaintiff was a party to the contract with the carrier, and no in-

[illegible] for defendant is in error that the plaintiff in the [illegible] failed to make out a *prima facie* case of liability on the part of defendant for injury to the goods, and that the learned trial court erred in granting his decision granting a new trial. [illegible] to the order, the judgment should be affirmed, [illegible] was granted, though the wrong reasons may have been given. We think the plaintiff did make out a *prima facie* case, and consequently the judgment of nonsuit was [illegible] and a trial upon the merits should be [illegible]

Judgment reversed. [illegible] concur. Fish, J., absent.

[illegible] See Mo. Georgia [illegible]

[illegible] As to carriers as to [illegible] What the contract is in writing, and its [illegible] such [illegible] be [illegible] known to be [illegible] carrier, [illegible] Missouri [illegible] only known as [illegible] proceed, and [illegible] to [illegible] [illegible] [illegible]

COLBURN v. PHILLIPS and Others.

1859. Supreme Judicial Court of Massachusetts. 13 Gray 64.

Action of contract upon the following agreement: "Salem, Oct. 6, 1853. Agreed with Jesse Colburn of Tyngsborough to ship say two hundred tons of rough stone, weighing from one to two tons each, from Phillips' Wharf, to the port of Norfolk, Va., at the rate of $1.75 per ton of fourteen cubic feet, and as soon after they are received as a vessel can be procured, the measurement to be made up from the marks upon each stone.

Phillips, Goodhue & Bowker.

"It is understood that Mr. Colburn shall not be liable for any expenses at Salem, except the charge of freight above specified.

P., G. & B.

"To be delivered at Norfolk, Va., to the order of Gault & Brother.

P., G. & B."

The substance of the declaration and of the demurrer thereto, upon which the case was argued in writing, are stated in the opinion.

Hoar, J.—The plaintiff made a written contract with the defendants to ship two hundred tons of stone from Phillips' Wharf in Salem to Norfolk, Va., at the rate of $1.75 a ton, as soon after they were received as a vessel could be procured, to be delivered in Norfolk, to the order of Gault & Brother; the plaintiff not to be liable for any expenses at Salem, except the freight as above specified. The plaintiff in his declaration alleges in substance that he made the contract on behalf and for the benefit of the firm of Gault & Brother, and their assigns, Gault & Christy; that he delivered the stone at Phillips' Wharf; but that the defendants did not ship it at the price agreed, but at a higher price; and that Gault & Christy paid the higher rate, under protest, on a part of the stone, and on the rest were compelled to pay it by process of the court of admiralty, with divers costs, expenses and counsel fees.

The defendants file an answer, denying some of the material allegations of the declaration; and insert in their answer a demurrer, which now comes before us for adjudication.

Four causes of demurrer are assigned. 1. That by the plaintiff's own showing the only cause of action belongs to Gault & Christy, and not to the plaintiff. In support of this it has been argued on the

where the agent has a lien or some other vested right, bring suit himself and thus suspend or extinguish the right of the agent." Niblack, J., in Rowe v. Rand, 111 Ind. 206, 210.

In Miller v. State Bank of Duluth, 57 Minn. 319, it was held that one who deposited money as agent for an undisclosed principal cannot maintain an action for it in his own name after the termination of the agency.

part of the defendants that a promise made expressly to one who is only the agent of another, from whom the consideration wholly moves, will not support an action in the name of the agent. Undoubtedly some support to this doctrine can be found in the *dicta* of judges in several reported cases, and there seems to be some confusion and inconsistency upon the subject in the cases themselves. But upon a careful examination it may appear that, while the reasons given for some of the decisions cannot be well reconciled, the decisions are for the most part harmonious, and can be sustained upon sound principles.

In Gilmore v. Pope, 5 Mass. 491, which was an action upon a subscription for shares in a turnpike company, with a promise to pay the assessments to the plaintiff, who was an agent of the company, the plaintiff was non-suited, and Parsons, C. J., said: "The action cannot be maintained in the name of a mere agent of the corporation, as in this transaction the plaintiff has alleged himself to be; there being no consideration, as between the agent and subscribers, to support an action of assumpsit." This remark of the chief justice would seem to assume that, to support a promise, the consideration must always move from the party to whom the promise is made. On examining the case, the promise is found to be a part of a contract to take and pay for shares in the turnpike road, in consideration of being admitted as associates in the corporation. This is very clearly a contract with the corporation. The promise is to pay the assessments to Gilmore or order; but there is not in terms any promise to Gilmore himself. The apparent purport, then, as well as the legal effect of the instrument, was an agreement with the corporation from whom the consideration proceeded. It would therefore stand as a promise to A, upon a consideration received from A, to pay a sum of money to B; upon which it is now well settled in this commonwealth that B can maintain no action, except under certain peculiar and limited conditions. Mellen v. Whipple, 1 Gray 317; Field v. Crawford, 6 Gray 116; Dow v. Clark, 7 Gray 198.

In Buffum v. Chadwick, 8 Mass. 103, the court decided that where a note was made to the plaintiff, describing him as agent of the Providence Hat Manufacturing Company, the action cauld be maintained by him, although the objection was suggested that he was a mere agent, and that the consideration moved from the company alone. They distinguish the case of Gilmore v. Pope, which was cited by the defendant's counsel, and observe that in that case "the contract was directly with the corporation."

In the case of Commercial Bank v. French, 21 Pick. 486, it was decided, that a promissory note made to "the cashier of the Commercial Bank," the note being the property of the bank, was a contract with the bank, on which the corporation might sue. Gilmore

v. Lloyd to Glyn as overruling the decision, but the case rests upon the doctrine that, by a due construction of the language used, as terms of description, the cost of the stock will not form

In Edwards Railroad v. Hendricks, 5 Gray 502, it was determined that upon an order payable "out of the funds of the Western Railroad Company," the commissioners being the real party in interest, might sue in their own name. The authorities were fully examined and discussed, and we are satisfied with the correctness of the decision; but no question arose in that case whether the action might not have been maintained, if brought in the name of the payee.

In Grant v. Cuming, 2 Johns. 487, the action was upon a receipt given to an attorney, in order to ascertaining to collect the money, not upon a contract belonging to his principal; but the court adverted to the fact that there was a subsequent promise to pay the money collected to the attorney; and they decided that the promise inured to the benefit of the principal. A case materially varying from that which we have suggested as proper to be put in the case of Lamine v. Dorrell.

There is a class of cases in which it has been held that a promise to a public officer, in his official capacity, may be enforced by him in the name of the public body for whose benefit he acts. Powell v. Thompson, 5 Bos. & Pul. 147; Irish v. Webster, 5 Greenl. 170; Garland v. Reynolds, 20 Me. 398. The principle is analogous to that which holds that one who stands a contract as a public officer is not personally responsible upon it, though the promise upon which it is put is that a full consideration of the contract shall be given to the principal.

In Thatcher v. Winslow, 5 Metc. 58, [illegible] that an agent not having any [illegible] may [illegible] any note, unless [illegible] Thatcher [illegible] to rely in support of the [illegible] Lamine v. Dorrell [illegible] more v. Lane, before cited. If the [illegible] this, that putting a promissory note into the hands of an agent, undocked of blanks, without any [illegible] to him to bring a suit upon it, will not [illegible] to transfer to the note to him as well [illegible] we [illegible] no doubt of its correctness.

[illegible] Story on Agency, [illegible] a note [illegible] a responsible note is delivered in blank, and [illegible] for collection, the agent may [illegible] and in his own name; and in this, that "if an agent [illegible] a note or instrument in his own name, for the benefit of [illegible] as well as the principal, may [illegible]." In the case [illegible] doctrine is stated in the broadest [illegible] a contract is made in writing [illegible] with an agent, who appears to be a contract personally with him, and the [illegible] is the only known

part of the defendants to [illegible] to one who is only the agent of another, upon whom the consideration wholly moves, will not support an action in the name of the agent. Undoubtedly, some respect to the question ought to be had to the decisions of judges in several reported cases, and there seems to be some confusion and inconsistency upon the subject in the cases themselves. But upon a careful examination of them, it would seem that, while the reasons given for some of the decisions cannot be well reconciled, the decisions are for the most part harmonious and can be sustained upon sound principles.

In Gilmore v. Hunt, 7 Mass. 358, which was an action upon a subscription for [illegible] a turnpike company, with a promise to pay the amount to the plaintiff, who was an agent of the company, the plaintiff was nonsuited, and Parsons, C. J., said: "The writing cannot be considered in the light of a mere agent of the company, as in connection the plaintiff has alleged himself to be, [illegible] consideration as between the agent and subscribers, [illegible] in favor of the company." The remark of the [illegible] would seem to indicate that, to support a promise, the consideration must always move from the party to whom the promise is made. On examining the case, the promise is found to be [illegible] and was to be done in the turnpike road in consideration of being appointed an associate in the corporation. This is very clearly connected with the corporation. The promise is to pay the commissioners of Gilmore or order; but there is not in terms any promise to the commissioners himself. The apparent purport, then, as well as the legal effect of the instrument, was an agreement with the corporation, upon which the consideration proceeded. It would therefore have been [illegible] for A. upon a consideration received from A., to pay [illegible] to B., upon which it is now well settled in this commonwealth that B. can maintain no action, except in most certain peculiar and limited circumstances. Meiser v. Whipple, 1 Gray 312; [illegible] 6 Gray 566; Dow v. Clark, 7 Gray 108.

In Bullen v. [illegible] 8 Mass. 129, the court decided that where a note was made to a plaintiff describing him as agent of the Providence Hat Manufacturing Company, the action could be maintained by him [illegible] the objection was suggested that he was a mere agent, and that the consideration moved from the company alone. They [illegible] the case of Gilmore v. Pope, which was cited by the defendant's counsel, and observe that in that case "the promise was directly to the corporation."

In the case of Commercial Bank v. Brench, 21 Pick. 486, it was decided, that a promissory note made to "the cashier of the Commercial Bank," the sole beneficial property of the bank was a concern with the bank, on which the consideration might rise. Gilmore

v. Pope is cited as sustaining the decision; but the case rests upon the doctrine that, by a just construction of the language used, as terms of description, the contract was made with the bank.

In Eastern Railroad v. Benedict, 5 Gray 561, it was determined that upon an order payable "to D. A. Neale, president of the Eastern Railroad Company," the corporation, being the real party in interest, might sue in its own name. The authorities were fully examined and discussed, and we are satisfied with the correctness of the decision; but no question arose in that case whether the action might not have been maintained, if brought in the name of the payee.

In Gunn v. Cantine, 10 Johns. 387, the action was upon a receipt given to an attorney, upon an undertaking to collect the money due upon a contract belonging to his principal; but the court notice the fact that there was no express promise to pay the money collected to the attorney; and only decide that the promise implied by law from the instrument was to the principal; a view consistent with that which we have suggested in regard to the case of Gilmore v. Pope.

There is a class of cases in which it has been held that a promise to a public officer, in his official capacity, must be enforced by a suit in the name of the public body for which he acts. Pigott v. Thompson, 3 Bos. & Pul. 147; Irish v. Webster, 5 Greenl. 171; Garland v. Reynolds, 20 Me. 45. The principle is analogous to that which holds that one who signs a contract as a public officer is not personally responsible upon it; though the ground upon which it is put is, that a just construction of the contract makes it the contract of the principal.

In Thatcher v. Winslow, 5 Mason 58, Mr. Justice Story held that an agent, not having any legal or equitable interest in a promissory note, cannot sue as endorsee upon it. The only authorities which he names in support of the doctrine are Gunn v. Cantine and Gilmore v. Pope, before cited. If the effect of the decision is merely this, that putting a promissory note into the hands of an agent, endorsed in blank, without any authority express or implied to him to bring a suit upon it, will not constitute such a transfer of the note to him as will support an action upon it in his name, we have no doubt of its correctness. Sherwood v. Roys, 14 Pick. 172.

But in Story on Agency, § 394, it is said that "if a negotiable note is endorsed in blank, and sent by the owner to his agent for collection, the agent may sue thereon in his own name as endorsee;" and in § 161, that "if an agent should procure a policy of insurance in his own name, for the benefit of his principal, the agent, as well as the principal, may sue thereon." In §§ 392, 393, 395, 396, the doctrine is stated in the broadest terms, that whenever the contract is made in writing expressly with the agent, and imports to be a contract personally with him, and also where he is the only known

or ostensible principal, and therefore is, in contemplation of law, the real contracting party, he may sue in his own name. And such is the general current of the authorities; and we are satisfied that, to support an action upon an express promise, it is in general immaterial whether the consideration move from the promisee or from another.

In Baxter v. Read, cited in Dyer, 272b, note, it was "adjudged that where Baxter had retained Read to be miller to his aunt, at ten shillings per week, this will support an action on the case; for although it is not beneficial to Baxter, it is chargeable to Read."

In Goodwin v. Willoboughby, Pop. 178, Doderidge, J., says: "If a stranger saith, 'Forbear such a debt of J. S., and I will pay it,' it is a good consideration for the loss to the plaintiff."

In Sargent v. Morris, 3 B. & Ald. 277, it was held, that the consignee could not sue for damage to goods shipped on board the defendant's vessel, the consignee being only the agent of the consignors, and having no present interest in the goods at the time of the injury. But there the bill of lading stated the reciept of goods from the consignors, and undertook "to deliver the same to you, and in your name, according to custom and usage, to Mr. Sargent or his assigns, paying freight," etc.

In Sims v. Bond, 5 B. & Ad. 393, and 2 Nev. & Man. 616, Lord Denman asserts that "it is a well-established rule of law that where a contract, not under seal, is made with an agent in his own name, for an undisclosed principal, either the agent or the principal may sue upon it."

In the case at bar, the contract was with the plaintiff in his own name, no other principal was disclosed, and it was executed on his part. We think the promise of the defendants was upon a sufficient consideration, and may be enforced by the person to whom it was expressly made.

2. It is said the declaration does not charge the defendants with the direct consequence of their breach of agreement, but for an excess of freight paid by the plaintiff. The contract and the breach of contract are expressly set forth. The damages occasioned thereby may or may not be correctly claimed or estimated, and it is no cause of demurrer.

3. It is objected that the declaration charges the defendant with the costs and expenses of the suit in admiralty. But this is only a statement, in part, of the damages; and although mistaken, does not affect the right to maintain the action.

4. The declaration does not state any demand upon the defendants for an allowance for the excess of freight, or a demand on them for the stone. No such statement is necessary. The gist of the action is the omission to furnish a vessel to carry the stone at the agreed price. When the defendants had shipped the stone at a

Judgment reversed, and cause remanded.

EVITT AND WIGHTMAN v. BANCROFT

1871 SUPREME COURT OF OHIO. 20 Ohio St. 418

Error to the Court of Common Pleas of Crawford county.

The defendants in error, the plaintiff in the court below, being a real estate agent, was, on the 9th of April, A. D. 1865, employed by one Webster to sell the farm of the latter. The authority was in writing, signed by the parties, and was to continue for one year. It was stipulated that the farm should not be sold for less than seventy-seven dollars per acre, and that the defendant in error should have all that the farm brought over and above said sum as compensation for his services, and the purchase money, at the option of Bancroft, seven dollars per acre he was to pay over to said Webster.

Subsequently the defendant in error made an agreement with the plaintiffs in error for the sale of said farm, of which the following is a copy: "This article of agreement, entered into this 1st day of November, A. D. 1865, by and between H. N. Bancroft, of the township of Jefferson, Ashtabula county, and state of Ohio, of the first part, and Samuel Evitt and [illegible], of Vernon and Crawford counties, Pennsylvania, of the second part, witnesseth: That the party of the first part has sold to the party of the second part the Lemon Webster farm, so called, containing one hundred acres of land, it being located in [illegible] and being the same upon which he now lives and which is placed in my hands for sale, the purchase money to be paid on the 1st day of February [illegible] when possession will be given. The party of the second part agrees to pay the first, or their equivalent [illegible] on the delivery of the second part. H. N. Bancroft, 1st [illegible]."

This agreement was duly executed.

Bancroft filed his petition [illegible] to have sustained by the breach of [illegible] on the part of Evitt and Wightman. He states, in his petition, [illegible]

[illegible]

No

higher rate, they had broken the contract declared on. Demurrer overruled, and case remitted.[1]

EVRIT AND WIGHTMAN v. BANCROFT.

1871. SUPREME COURT OF OHIO. 22 Ohio St. 172.

THE defendant in error, the plaintiff in the court below, being a real estate agent, was, on the 3d of April, A. D. 1865, employed by one Webster to sell the farm of the latter. The authority was in writing, signed by the parties, and was to continue for one year. It was stipulated that the farm should not be sold for less than thirty-seven dollars per acre, and that the defendant in error should have all that the farm brought over and above said sum as compensation for his services, and the purchase money, to the extent of thirty-seven dollars per acre, he was to pay over to said Webster.

Subsequently the defendant in error made an agreement with the plaintiffs in error for the sale of said farm, of which the following is a copy: "This article of agreement entered into this 1st day of November, A. D. 1865, by and between H. N. Bancroft, of the township of Jefferson, Ashtabula county, and state of Ohio, of the first part, and Samuel Evrit and E. E. Wightman, of Venango and Crawford counties, Pennsylvania, of the second part, witnesseth: That the party of the first part has sold to the party of the second part the Luman Webster farm, of one hundred and forty-three acres of land, it being located in the township of Jefferson, and being the same upon which he now lives, and being the same farm which is placed in my hands for sale, for the sum of $6,500, all to be paid on the 1st day of February, A. D. 1866, at which time possession will be given. The sugar-house fixtures are to go with the farm, or their equivalent paid in cash to the party of the second part. H. N. BANCROFT, SAMUEL EVRIT, E. E. WIGHTMAN."

This agreement was duly stamped.

Bancroft filed his petition to recover the damages he claimed to have sustained by the breach of this contract on the part of Evrit and Wightman. He states, in his petition, the amount of his dam-

[1] Compare Considerant v. Brisbane, 22 N. Y. 389.

It was held in Rhoades v. Blackiston, 106 Mass. 334, that the agent's right to sue on the contract made in his own name would not pass to his assignee in bankruptcy.

ages to be "twelve hundred and nine dollars, that being," as he avers, "the amount of money which belonged to him as his commission for selling said farm."

A demurrer to the petition having been overruled, the case was submitted to a jury on an inquiry of damages. On the trial the plaintiff gave no evidence as to the value of the land. The evidence introduced by the defendants showed the value of the farm on the 1st day of February, A. D. 1866, to have been from forty-eight dollars to fifty dollars per acre.

The defendants below asked the court to charge the jury that the true rule of damages was the difference between the contract price of the farm and its value at the time of the breach of the contract, or on the 1st day of February, A. D. 1866; and that if the jury should find that the value of the farm at said time equaled or exceeded the price agreed to be paid by said defendants in the contract, the jury should return a verdict for the defendants.

This instruction the court refused; but told the jury in effect, among other things, that if the defendants had kept and performed their contract, the plaintiff's interest therein would have been the difference between thirty-seven dollars per acre and the amount the said defendants agreed to pay for the same, and that the defendants, by their non-performance or refusal to perform, could not lessen the plaintiff's interest in said contract, and that the rule of damages would be the difference between thirty-seven dollars per acre for the farm and the price the defendants agreed to pay for it.

The verdict was in favor of the plaintiff for $1,429.64, on which, after overruling a motion for a new trial, the court rendered judgment.

The object of the present petition in error is to obtain the reversal of this judgment.

White, J.—The original action was not an equitable one brought for the specific performance of the agreement for the sale of the farm, and for the apportionment of the purchase money between the plaintiff and his principal. It was strictly an action *in personam* to recover damages from the defendants for the breach of the contract.

We deem it unnecessary now to inquire whether there was technical error in overruling the demurrer to the petition. The bill of exceptions clearly discloses the real character of the case. The claim which the plaintiff sought to enforce against the defendants consisted of the compensation to which he would have been entitled, under his agreement with his principal, if the agreement with the defendants for the sale of the farm had been performed. As his loss in this compensation resulted from the default, as he alleges, of the defendants, he claims the right to make them respond in dam-

agent to the agent who may be necessary to make it. We think he has no such right.

The defendants must be charged on the agreement according to this construction. They [illegible] be accountable upon their own agreement, and the rights of persons to the same property are not to be brought in the name of the principal or in the name of the agent as one of the contracting parties. The agent entering into a contract for the sale of property of his principal, in which he has himself personally, acquires no greater rights against the purchaser than he would acquire if he was contracting for the sale of his own property.

In this case it appears from the proof that the property is of greater value than the contract money. The defendants could have been only nominal if the principal had sued, or if the purchaser had sued the farm he contracted to sell. But upon the theory on which the case was tried and disposed of in the court below, as for the agent's compensation as agent was for the profit of his employment, and depended upon the defendants fulfilling their agreement, and on their default became liable to him for the loss of such compensation, although if there had been no agency they would only have been liable for nominal damages.

We think the law imposes on them no such liability. The loss of such compensation was not the natural and proximate result of the breach by the defendants of their contract.

Judgment reversed, verdict set aside and venire [illegible]

[illegible] v. [illegible]

[illegible]

Libel for negligence in the care of a [illegible]. Plea, not guilty. Trial by jury, [illegible] C. J. presiding. A verdict [illegible] and judgment on the verdict [illegible]

For the report of the [illegible] on demurrer, see this case, 20 V. [illegible]

Wheaton, for the [illegible]

In United States Telegraph Co. v. [illegible] 13 Pet. 26, it was held that an agent who contracted for an exclusive [illegible] could not recover damages for breach of the contract, [illegible] and Wilson v. Hicks, ante, 364, and [illegible] agent was entitled to [illegible]

ages to the extent that may be necessary to repair it. We think he has no such right.

The defendants were no parties to the agreement providing for this compensation. Their liability is to be ascertained from their own agreement, and the rule of damages is the same whether the suit is brought in the name of the principal or in the name of the agent as one of the contracting parties. An agent entering into a contract for the sale of property of his principal, in which he binds himself personally, acquires no greater rights against the purchaser than he would acquire if he was contracting for the sale of his own property.

In this case it appears from the proof that the farm was of greater value than the contract price; hence the damages could have been only nominal if the principal had sued, or if the plaintiff had owned the farm he contracted to sell. But upon the theory on which the case was tried and disposed of in the court below, as the plaintiff's compensation as agent was, by the terms of his employment, made dependent upon the defendants fulfilling their agreement, they, on their default, became liable to him for the loss of such compensation, although if there had been no agency they would only have been liable for nominal damages.

We think the law imposes on them no such liability. The loss of such compensation was not the natural and proximate result of the breach, by the defendants, of their contract.

Judgment reversed, verdict set aside, and cause remanded.[1]

HOLDEN v. RUTLAND RAILROAD COMPANY.

1901. Supreme Court of Vermont. 73 Vt. 317.

Case for negligence in the sale of a mileage book. Plea, not guilty. Trial by jury, Caledonia county, June term, 1900, Taft, C. J., presiding. A verdict for the defendant was directed and judgment on the verdict was rendered. The plaintiff excepted.

For the nature of the declaration, which was held sufficient on demurrer, see this case, 72 Vt. 156.

Watson, J.—The mileage-book in question was purchased of

[1] In United States Telegraph Co. v. Gildersleve, 29 Md. 232, it was held that an agent who contracted for an undisclosed principal may recover full measure of damages for breach of the contract. On page 246, Alvey, J., said: "He, of course, sues and recovers as trustee for his principal."

the defendant's ticket agent at Burlington by the plaintiff as the agent of Dana O. Coles, but the plaintiff did not make known his agency nor disclose his principal. In selling such tickets, the purchaser's name is required to be signed to the contract printed in the back part of the book. The plaintiff, being requested by the ticket agent thus to sign the book in question, signed his own name thereto, instead of that of his principal. By force of the contract it is the duty of the selling agent to enter the purchaser's name in the front part of the book, as the person to whom the ticket is issued and entitled to transportation thereon. In the place for so doing, the selling agent entered the name of "A. F. Holden" instead of "D. F. Holden," the plaintiff's name signed in the back part of the book as the purchaser. The ticket was then used by the plaintiff in going from Burlington to Rutland and return. Upon his return, he gave the book to Coles and paid him for the number of miles used. About two months afterwards the plaintiff hired the book of Coles, and with his daughter attempted to go from Burlington to Rutland on another journey. The daughter's name had then been inserted in the front part of the book by Coles as a member of the purchaser's family and a person entitled to transportation thereon. In making this journey over the defendant's road, the plaintiff offered the book for the transportation of himself and daughter, but the conductor refused to accept it, and they rode without paying fare to Rutland, where the plaintiff was arrested at the request of the conductor and detained for some little time before being released. The plaintiff claims that his name should have been entered in the front part of the book as the person to whom the ticket was issued, and that to enter the name of "A. F. Holden" instead was negligence by the ticket agent; and further that the damages suffered by the plaintiff by reason of the conductor's refusal to accept the book for transportation was the result of this negligence for which the defendant is liable. The court below ordered a verdict for the defendant, to which the plaintiff excepted. Was this error? is the sole question. The plaintiff purchased the mileage-book for Coles and as his agent, but he neither disclosed his agency nor his principal. In these circumstances it is a well-settled rule of law that an action for a breach of contract not under seal may be brought in the name of either the agent or the principal; in the name of the agent because he has been treated by the defendant as the other party to the contract; in the name of the principal because he is the person really interested in the contract, for whose benefit it was made, and with whom it is considered in law as made. Dicey Part. 136; Sims v. Bond, 5 B. & Ad. 393; Lapham v. Green, 9 Vt. 407.

But that this rule of law shall not be so exercised as to work an injustice to the other party to the contract, other rules incident thereto are equally well established. One of these is that if the

action is brought by the agent in his own name the defendant may avail himself of those defenses which are good against the agent who is the plaintiff in interest, but of no defense that would be good against the principal if suit were instead brought. Dicey Part. 622; Smith's L. C. 548.

By selling the indicated book the company contracted with the purchaser to accept the coupons therein for transportation of the purchaser, the members of his family, employees of his firm, or salesmen of the firm, whose names are entered by the selling agent of the company in the front part of the book as persons entitled to transportation thereon; that only the persons whose names are thus entered are lawfully entitled to such use of the book; that in case of any desired change or addition in the names of such persons, the same will be made on application to the ticket agent at the station where the book was sold, and that no change in such names or names will be made except on application to the ticket agent of the company from whom it was purchased, and no others or other will be recognized unless done by such agent. When such a book is sold, the name of the purchaser is required to be signed to the contract in the back part of the book; and when this is done, and the ticket is accepted by him, he is bound by the terms of the contract. Rahilly v. St. Paul, etc., Ry. Co., 60 Minn. 153; Krueger v. Chicago, etc., Ry. Co., 68 Minn. 227, 70 Am. St. 487; Boylan v. Hot Springs R. R. Co., 132 U. S. 146; Parsons v. Cunard S. S. Co., 153 Mass. 551, 25 Am. St. Rep. 660; Hammond v. Southern Pac. R. Co., 7 Utah 118.

When the plaintiff hired the book of Coles the purpose of the action, he informed Coles that his daughter was going with him, whereupon her name was inserted in the book as before stated. Assuming that her name might properly have been considered as a member of the purchaser's family, thereby entitling her to transportation upon the ticket under the provisions of the contract, it could be done only by the ticket agent at the station where the ticket was sold. Whether the plaintiff's daughter was entitled to insert it

[illegible] orders are usually [illegible] [illegible] [illegible]

action is brought by the agent in his own name, the defendant may avail himself of those defenses which are good against the agent who is the plaintiff on record; also of any defense that would be good against the principal in whose interest the action is brought. Dicey Part. 142; 2 Smith's L. C. 428.

By selling the mileage-book the defendant contracted with the purchaser to accept the coupons therein for transportation of the purchaser, the members of his family, members of his firm, or salesmen of the firm, whose names are entered by the selling agent of the company in the fore part of the book as persons entitled to transportation thereon; that only the persons whose names are thus entered are lawfully entitled to such use of the book; that in case of any desired change or addition in the names of such persons, the same will be made on application to the ticket agent at the station where the book was sold; and that no change in such name or names will be made except on application to the ticket agent of this company from whom it was purchased, and no change in name will be recognized unless made by such agent. When such a ticket is sold, the name of the purchaser is required to be signed to the contract in the back part of the book; and when thus signed, and the ticket is accepted by him, he is bound by the terms of the contract. Rahilly v. St. Paul, etc., Ry. Co., 66 Minn. 153; Krueger v. Chicago, etc., Ry. Co., 68 Minn. 445, 64 Am. St. 487; Baylon v. Hot Springs R. R. Co., 132 U. S. 146; Fonseca v. Cunard S. S. Co., 153 Mass. 553, 25 Am. St. Rep. 660; Drummond v. Southern Pac. R. Co., 7 Utah 118.

When the plaintiff hired the book to make the journey in question, he informed Coles that his daughter was going with him, whereupon her name was inserted in the book as before stated. Assuming that her name might properly have been there inserted as a member of the purchaser's family, thereby entitling her to transportation upon the ticket, under the provisions of the contract it could be done only by the ticket agent at the station where the ticket was sold. Neither the plaintiff nor Coles had any right so to insert it.

Such tickets are usually sold at lower rates than common regular tickets, and are good for transportation between all stations on the road of the company selling them. Unless sold as good for transportation of bearer, such provisions of the contract as have been named are reasonable, material, and important in preventing fraud upon the railroad company. Without provisions for that purpose, the name of any one intending to make a journey over the company's road might be inserted in a mileage-book by its owner or possessor as he saw fit, thereby making it, to all intents and purposes, good for transportation of bearer.

The insertion of the name of the plaintiff's daughter, therefore,

was a material alteration of the contract and a fraud upon the defendant. Indeed, her name was thus inserted for the express purpose of enabling the plaintiff to make a fraudulent use of the ticket. It is an established principal of law that a material alteration of a written contract by one of the contracting parties without the consent of the other operates as a discharge of the contract; "because," says Lord Kenyon in the leading case of Master v. Miller, 4 T. R. 320, 2 Eng. R. C. 669, "no man shall be permitted to take the chance of committing a fraud, without running any risk of losing by the event, when it is detected." Chitty on Con. 868; Bigelow v. Stilphens, 35 Vt. 521; Derby v. Thrall, 44 Vt. 413. In Bellows v. Weeks, 41 Vt. 590, this rule is said to be "founded in public policy, and tends to prevent tampering with written instruments by the parties, who are under a temptation to do so; the forfeiture of the original instrument operating in the nature of a penalty."

This defense being available in an action brought by the agent in his own name, the verdict was properly ordered. Let judgment be affirmed.

START, J., concurs in the result.

HAYDEN v. ALTON NATIONAL BANK.

1888. APPELLATE COURT OF ILLINOIS. 29 Ill. App. 458.

GREEN, P. J.—Appellant brought suit against appellee to recover an amount of money deposited with the latter by appellant in the name of "William H. Hayden, Agent." The cause was tried by the court without a jury, under a plea of the general issue and notice of "set-off," stating that the defendant would insist the money sued for was the property of George D. Hayden and not plaintiff's, and came to and was received by plaintiff as agent for George D. Hayden, and was deposited with defendant by plaintiff in his name, but as agent for George D. Hayden, who, before the commencement of this suit, was and is indebted to defendant on three notes, two for $1,000 each and one for $300 (describing notes), signed by George D. and Sarah Hayden, which notes became due before the commencement of the suit, and offers to set off and allow against demand sued for so much of said money due from said George D. Hayden to defendant as will be sufficient to satisfy and discharge such demand. No findings of law were requested on behalf of either party. The court found the issues for defendant and ren-

was a material alteration of the contract and a fraud upon the defendant. Indeed, [illegible] for the express purpose of enabling the plaintiff to make a fraudulent use of the ticket. It is an established principle in law that a material alteration of a written contract by [illegible] without the consent of the other operates as a discharge of the contract, "because," says Lord Kenyon in the leading case of Master v. Miller, 4 T. R. 320, 2 Fonb. R. [illegible], "no man shall be permitted to take the chance of committing a fraud against running any risk of loss by the event, when it is detected." Story on Cont. 698; Bigelow v. Stilphens, 35 Vt. 521; [illegible] Thrall, 42 Vt. 413. In Bellows v. Weeks, 42 Vt. [illegible] said to be "founded in public policy, and tends to prevent [illegible] with written instruments by the parties. [illegible] stipulation to do so [illegible] the forfeiture of the original [illegible] in the nature of a penalty."

[illegible] sustainable in an action brought by the agent in his own name [illegible] was properly ordered. Let judgment be affirmed.

[illegible]

[illegible] NATIONAL BANK

[illegible] Supreme Court of Illinois. 29 Ill. App. 428

Lawrence, J. [illegible] brought suit against appellee to recover [illegible] of money [illegible] with the same by appellant in the name of "William [illegible] Agent." The cause was tried by the court without a jury, [illegible] a plea of the general issue and notice of "set-off," [illegible] defendant would [illegible] the money sued for was [illegible] George D. Hayden and [illegible] plaintiff's, and came to and was [illegible] plaintiff as agent for George D. Hayden, and was [illegible] [illegible] in his name, but as agent for George D. [illegible] commencement of the suit, was [illegible] three notes, two for $1000 each [illegible] $500 (including [illegible]), signed by George D. and [illegible] to [illegible] because due before the commencement of the suit, and offered to set off and allow against [illegible] such [illegible] to [illegible] due from said George D. Hayden to defendant [illegible] to satisfy and discharge such demand. No [illegible] were requested on behalf of either party. The court [illegible] for defendant and ren-

dered judgment against plaintiff for costs, whereupon plaintiff took this appeal, his motion for a new trial having been overruled. It appears from the evidence said George D. Hayden had been engaged in business in Alton until August 2, 1887, when he disappeared, leaving no one in charge of his business; that a few days after his departure his brother, the appellant, came to Alton, and, as he says, at the instance of creditors of George D. Hayden, took charge of the business as the agent of his brother to look after it until it should be ascertained where his brother was. During the time he was so acting, and on September 3, 1887, he opened an account with appellee in the name of "William H. Hayden, Agent," and between September 3 and 7, 1887, deposited with appellee to the credit of that account $566.54; against this account a check for $40 and one for $22.50 had been drawn by appellant and paid by the bank, leaving a balance of $504.04, to recover which this suit is brought. It is claimed on behalf of appellant that this deposit was made by him in his own name; that it was received, accepted and entered by appellee upon its books as his; that the greater part of it was deposited and to be appropriated for a certain specific purpose with the consent of the bank, and under this state of facts appellee had no lien, as a bank, upon the sum deposited for the debt of George D. Hayden, and had no legal right to apply such balance of the deposit as a credit upon the note of George D. and Sarah Hayden, or set off such note against said balance. The state of facts so claimed to exist was denied on behalf of appellee, and on its behalf it is claimed the money was deposited by plaintiff as the money of George D. Hayden, and it was so understood and made known to defendant by plaintiff; that the plaintiff was acting with defendant in depositing this money as the agent of George D. Hayden in conducting the business out of which the money deposited was derived. The evidence introduced in support of these disputed facts by the respective parties was conflicting, but the trial court, who saw the witnesses and heard them on the stand while being examined as such, occupied a position and had an opportunity enabling it to determine more accurately and fairly the weight and credit to be given the testimony of each witness than is afforded this court, and has settled that conflict and determined the disputed facts in favor of defendant below. Such finding ought not to be disturbed unless it is manifestly and clearly wrong. We have carefully examined all the evidence contained in the record and are satisfied the court below was warranted in finding that plaintiff, as agent of George D. Hayden, deposited the money with the bank as George D. Hayden's money, derived from his business then being carried on by plaintiff as his agent; that defendant was notified of these facts at the time said account was opened, and was never informed to the contrary, and that no part of the money so deposited was set

apart or appropriated for any specific purpose with the knowledge or consent of the bank; and in saying this we are not unmindful of the fact that Wade testified, after the balance of the deposit had been endorsed as a credit upon the note of George D. and Sarah Hayden, and plaintiff was told of it and made no objection, plaintiff told him there were some debts incurred he felt morally bound to pay, and exhibited a memorandum showing the nature and amounts thereof, aggregating $207.11, and said if this sum was allowed he had no objection to such application of the balance, and thereupon witness, after consultation with his associates in the bank, agreed to the request and consented to allow him that sum. No lawful consideration supports such promise, and the next day the plaintiff repudiated the arrangement by bringing this suit.

If this finding of the court was justified by the evidence, the questions remaining to be decided are, could defendant below set off a debt of George D. Hayden against the demand sued for? And was the note upon which said balance was endorsed as a credit a debt of his? Both of these questions, we think, must be answered in the affirmative.

When appellant claimed and was known to be acting for George D. Hayden merely as his agent, his acts and contracts must be deemed to be the acts and contracts of his principal only, and "involve no personal responsibility on the part of the appellant." Story on Agency, § 261, *et seq.* And in an action by him to recover money due his principal, a debt of the principal may be set off. Huntington v. Knox, 7 Cush. 371. If the suit is brought in the name of the agent instead of the principal, upon any contract knowingly made by the former for the latter, the other contracting party will generally be entitled to make the same defense, and establish the same claims against the agent that he would be entitled to if the suit was brought in the name of the principal. Story on Agency, § 404.

Where a depositor is indebted to a bank, the latter has a right to apply so much as may be necessary of the funds deposited, undisposed of and remaining in its hands, to the payment of his matured indebtedness. Commercial Bank of Albany v. Hughes, 17 Wend. 94; Morse on Banks and Banking, 27. But appellant insists that a bank has a right of set-off against a deposit only in a case where a depositor and debtor is the same person, and that here appellant is a depositor and his principal is the debtor; hence, under the rule, defendant was not entitled to the set-off claimed. In law, however, under the facts found, George D. Hayden was the depositor, notwithstanding the deposit was made by his agent. The authorities cited, and many others not cited, support the view we have expressed. If the finding of the trial court was justified by the evidence, the debt of George D. Hayden due defendant was properly allowed as a set-off against the demand sued for. Appellant claims,

...answer, that the note upon which the ... the balance of ... sued for was executed ... D. Hayden, but was a joint debt of him and ... and therefore not a proper set-off against his ... The note reads as follows:

"$1,000. ...

"Ninety days after date I promise to pay to ... National Bank one thousand dollars, with interest at ... per annum until paid, for value received, payable at the ... tional Bank.

"Geo. D. Hayden.
"Sarah Hayden."

On this note appellee could maintain any ... George D. Hayden alone, and it ... for him to forbid its allowance as a set-off against any separate ... it ... against appellant. Set-off of a joint and several ... against the debt claimed to be due one of the makers is admissible. Gardner v. Parmlee, 10 Iowa, 291; White v. Rogers, 6 Blackf. 435, and numerous other cases announce this rule.

We conclude, therefore, said note was a proper set-off as a claim of George D. Hayden against the demand sued for, and the court below did not err in so holding.

The judgment of the circuit court is affirmed.

Judgment affirmed.

Section 4.—Liability of Agent to Principal.

...

however, that the note upon which the credit of $504.04 balance of deposit sued for was endorsed, was not a debt of George D. Hayden's, but was a joint debt of him and Sarah Hayden, and therefore not a proper set-off against his separate demand. The note reads as follows:

"$1,000. ALTON, April 22, 1887.

"Ninety days after date I promise to pay to the order of Alton National Bank one thousand dollars, with interest at eight per cent. per annum until paid, for value received, payable at the Alton National Bank.

"GEO. D. HAYDEN,
"SARAH HAYDEN."

On this note appellee could maintain suit against George D. Hayden alone, and if so, no legal objection forbids its allowance as a set-off against any separate demand of his against appellant. Set-off of a joint and several note against the debt claimed to be due one of the makers is admissible. Stadler v. Parmlee, 10 Iowa 23; White v. Rogers, 6 Blackf. 436, and numerous other cases announce this rule.

We conclude, therefore, said note was a proper set-off as a debt of George D. Hayden against the demand sued for, and the court below did not err in so holding.

The judgment of the circuit court is affirmed.

Judgment affirmed.

Section 4.—Liability of Agent to Third Party.

BARTLETT v. RAYMOND.

1885. SUPREME JUDICIAL COURT OF MASSACHUSETTS.
139 Mass. 275.

CONTRACT, on an account annexed, for goods sold and delivered on November 18, and December 4, 1882. Answer: 1. A general denial. 2. That, if the goods were sold at all, they were sold to the firm of George J. Raymond and Company, in which firm the defendant was not a partner, and had no interest. Trial in the superior court, before Brigham, C. J., who allowed a bill of exceptions, in substance as follows:

The following appeared in evidence, and was uncontradicted: From 1877, to July 24, 1882, the defendant had done business at sev-

eral places in Boston, and in 1879, and from that time until his insolvency, at a shop on Tremont Row, in Boston, under the firm name and style of George J. Raymond and Company. On July 24, 1882, he was adjudged insolvent under the insolvents laws of Massachusetts, in involuntary proceedings upon a creditor's petition, and a warrant was issued, and the messenger took possession of the store and goods, and excluded the defendant and retained possession until they went into the hands of the assignees. Afterwards, one John G. Stewart, Jr., put a stock of goods into the same shop, and carried on business under the same firm name and style, of George J. Raymond and Company. He put up a new sign, but it bore the same firm name. He hired the defendant, George J. Raymond, as a clerk, at a salary of $3,000 a year, and the defendant had no further interest in the business. The plaintiffs had never dealt with the firm of George J. Raymond and Company before the insolvency of Raymond, nor until after Stewart had commenced to do business under that firm name at that shop, and there was no evidence that they had any actual knowledge or notice of the defendant or his business history, or of Stewart or the defendant's relations to him, before the transactions out of which this alleged cause of action arose. One of the plaintiffs went into this shop to sell goods; he found the defendant there, and had all his talk with him, and sold the bill of goods, charging them to George J. Raymond and Company. He did not make any inquiries as to who constituted the firm of George J. Raymond and Company, and nothing was said about it. The bills were sent in charged to George J. Raymond and Company, and the goods were sold in the shop owned and so run by Stewart, and were such goods as were usually sold in that shop, and were sold by the plaintiffs for the purpose and with the expectation that they were to go into the stock of said shop for sale there. No question was made as to the responsibility of John G. Stewart, Jr.

The defendant contended that the plaintiffs were affected with notice, by the public proceedings, of his insolvency, notwithstanding they had no actual knowledge of the same, as bearing upon the question whether they had any knowledge or cause of belief that the defendant was not dealing with them in his own business, and asked that the jury be so instructed. The judge refused to give such instruction.

The defendant also contended that, on the above evidence, he was not liable in this action, but the judge declined so to rule, and instructed the jury that, "if George J. Raymond, at a shop bearing upon it the sign George J. Raymond and Company, purchased of plaintiffs the goods described, notwithstanding it was a fact that, at that time and during all of the time of the delivery of said goods, all the business of that shop was owned and conducted by John G. Stewart, but under the name of George J. Raymond and Company, and George J. Raymond was a clerk only of said Stewart, and so

acted in the purchase of said goods [illegible] Reynolds would be liable as one [illegible] for the price of said goods [illegible] the same may have been charged [illegible] and [illegible] to George J. Reynolds and [illegible] [illegible] [illegible]

acted in the purchase of said goods, George J. Raymond would be liable in this action for the price of said goods, although the same may have been charged in the plaintiff's books, and delivered, to George J. Raymond and Company, unless he disclosed to the plaintiffs, or they had otherwise notice or knowledge, that he was a clerk only in said shop, and that said Stewart was the exclusive owner and conductor of the business there."

The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions.

HOLMES, J.—The defendant not only suffered his name to be used as part of the firm name, but made the bargain for the goods in person, and in the shop bearing the firm name upon its sign. The plaintiffs had no notice that he was not interested in the business. They seem to have known the firm name, and under the instruction excepted to, we think that the jury must have found that they also knew the name of Raymond, with whom they dealt. Certainly it does not appear from the bill of exceptions that they did not know his name. Without inquiring whether all these circumstances are necessary to the defendant's liability, we are of opinion that he is liable upon the facts stated. Young v. Axtell, cited 2 H. Bl. 242; Guidon v. Robson, 2 Camp. 302; Poillon v. Secor, 61 N. Y. 456. The question is not whether another defendant should have been joined, but whether the defendant was bound by the contract.

We understand the defendant to abandon the suggestion that the plaintiffs were affected with constructive notice of the proceedings against him in insolvency, and that this must be taken into account in determining whether they knew that he was not dealing with them in his own business. There was no evidence that they had actual knowledge.

Exceptions overruled.[1]

ARGERSINGER ET AL. V. MACNAUGHTON.

1889. COURT OF APPEALS OF NEW YORK. 114 N. Y. 535.

BRADLEY, J.—This action was brought to recover damages alleged to have been sustained by breach of warranty in the sale by the defendant to the plaintiffs of a quantity of antelope skins, and the plaintiff recovered. The defendant was a commission merchant

[1] "A person contracting as agent will be personally responsible where at the time of making the contract he does not disclose the fact of his agency and the name of his principal." Gildersleeve, J., in Beidleman v. Kelly, 99 N. Y. Supp. 907, 908.

See Elliott v. Bodine, 59 N. J. L. 567, where a husband acted as agent of his wife without disclosing the fact of agency.

in the city of New York. The sale in question was in the line of his business, and made by him as such merchant. The referee found that the warranty was made by the defendant that they were a sound, choice lot of Indian-handled skins, free from damage by worm-cut, and that there was a breach of such warranty. The evidence on the part of the plaintiffs tends to prove those facts, and for the purpose of this review, they must be deemed established. The main contention on the merits on the part of the defendant is, that he was not liable, because the sale was made by him as agent of his consignors of the property sold. Upon that subject, the referee found that the defendant did not sell the skins upon his own account, but as a commission merchant, and that the plaintiffs knew that he was acting as an agent only, and that his commission was 5 per cent. The referee, however, determined that the warranty was the undertaking of the defendant, and that he was charged with liability by its breach. The general rule is, that an agent employed to do an act is deemed authorized to do it in the manner in which the business intrusted to him is usually done, and such is the presumed limitation upon his power to act for his principal. Easton v. Clark, 35 N. Y. 225; Smith v. Tracy, 36 *id.* 79; Upton v. Suffolk Co. Mills, 11 Cush. 586, 59 Am. Rep. 163.

While the defendant dealt in the property of others, for whom he made sales, his business of commission merchant was his own. He undertook to sell the goods sent to him for this purpose, and to account to his consignors for the proceeds, less his commission. As between him and them, without any special instructions or authority, it would seem to be inferred that he should sell the goods as they were. And it is difficult to find in such case any implication of power, derived from them, to undertake that the goods were in any respect other or different than they in fact were. Unless the character or the quality of the goods consigned to him is communicated by the consignors, it is the business of the commission merchant to ascertain what they are in that respect, and put them upon the market only as such; and when he goes beyond that he is not, as between him and his principal, within the authority presumptively conferred by the latter upon him. It does not appear that those parties, from whom the defendant received the property in question for sale, gave him any description of the quality or condition of it, or that he acted otherwise than upon his own knowledge or judgment in that respect in making the sale and warranty; nor is it found that he had authority from his consignors to warrant it. But there was some evidence given, on the part of the defendant, to the effect that it was the custom in the trade of commission dealers not to warrant goods sold. While the purpose of such evidence was to bear upon the fact whether any warranty was made, and in support of his proof that none was made in this instance, it also went further, and may have been treated as bearing upon the question of the presumption of au-

thority from his principal. If the custom of such dealers was to sell goods as they were, and solely upon the inspection and risk of the purchasers, it is certainly difficult to see how any authority from the defendant's principals to warrant could presumptively arise to relieve him from personal liability for such undertaking made by him to the plaintiffs.

The conclusion was, therefore, permitted that the defendant's relation to the warranty and its consequence was not qualified by his agency, pursuant to which he made the sale to the plaintiffs.

The defendant did not inform the plaintiffs, nor were they in any manner advised, of the name or names of the party or parties who sent the skins to the defendant to be sold by him. The question is presented, whether the fact that the defendant failed to give the plaintiffs such information was sufficient to deny to him the right to make his agency effectual as a defense. It does not appear that the plaintiffs had any knowledge of the names of the consignors of the property, or that the defendant supposed they had such knowledge. In such case, there is some reason to conclude that the defendant intended to make the warranty his own as between him and the purchasers. And the proposition that an agent contracting in his own name and failing to disclose the name of his principal at the time of making a contract for the sale or purchase of goods, is personally liable for whatever obligation may arise out of the contract, has the support of authority. Mills v. Hunt, 17 Wend. 333; Morrison v. Currie, 4 Duer. 79; Cobb v. Knapp 71 N. Y. 348, 27 Am. Rep. 51; Ludwig v. Gillespie, 105 N. Y. 653; Jemison v. Citizens' Sav. Bank, 44 Hun 412. That doctrine is applicable to the present case. The defendant made the contract of sale in his own name, as commission merchant, without disclosing the name of any principal; and his warranty given to produce it may, within that rule, as between the parties, be deemed his undertaking. In such case, it may be supposed that a purchaser relies upon the responsibility of the person with whom he deals for the performance of the contract, and that he is not required to look elsewhere to obtain it. When there is, in fact, a principal, the agent may ordinarily relieve himself from personal liability, upon a contract made in his behalf, by disclosing his name at the time of making it. Upon such disclosure, however, the party proceeding to deal with the agent may or may not, as he pleases, enter into contract upon the responsibility of the named principal, but to permit an agent to turn over to his customer an undisclosed and, to the latter unknown, principal, might have the effect to deny to the customer the benefit of any available or responsible means of remedy or relief founded upon the contract. The rule is no less salutary than reasonable that an agent may be treated as the party to the contract made by him in his own name, unless he advises the other party to it of the name of

the principal whom he assumes to represent in making it, where that is unknown to such party.

This proposition is not inconsistent with the general rule that an agent, acting within the scope of his authority with a party advised of his agency, will not be personally charged, unless it appears, that such was his intention. Hall v. Lauderdale, 46 N. Y. 70. The disclosure of his agency is not completely made, unless it embraces the name of the principal; and without that the party dealing with him may understand that he intended to give his personal liability and responsibility in support of the contract and for its performance. The cases cited by the defendant's counsel, having the relation to the right of set-off in behalf of a person who has dealt with an agent, whose agency was unknown to such person, have no necessary application to the question now here. In those cases the question arose between the principal and the party dealing with the agent, without any knowledge of his agency, and upon the faith that he was dealing on his own account in selling property in his possession, and of which he apparently was the owner. And in such cases the right of the party purchasing property of the agent to set off a claim against the latter, in an action brought by the principal, is dependent upon, not only want of actual knowledge of the agency, but of circumstances which would direct a prudent man to inquiry and information of the fact, or furnish him reason to believe that he was dealing with an agent: Wright v. Cabot, 89 N. Y. 570; Nichols v. Martin, 35 Hun 168, and cases there cited. This rests upon the principle that where one of two innocent parties must suffer loss, it should fall on him who has furnished the means and opportunity to another to do that which is done by the latter to cause it. The contract of sale was an executed one, and while the return of the property to the defendant may have been a suitable manner of amicably adjusting the matter, the plaintiffs were not legally required to do so. After the skins were purchased by and delivered to them, the plaintiffs had the right to retain them, and seek their remedy founded upon breach of the warranty. Nor is it seen how that right is qualified, as applied to this case, by the fact that the defendant was dealing with the property of others to whom he was required to account for the proceeds of sales made by him. He was, soon after the sale, advised of the claim of the plaintiffs for damages on account of the impaired condition of the skins; and if the defendant, as between him and his consignors, acted within the authority derived from them in making the warranty, he had the opportunity of seeking indemnity in some manner before he paid over such proceeds to his principals. It is deemed unnecessary to advert more fully to the evidence in support of the facts found by the referee, as it does not appear that the case contains all the evidence: Porter v. Smith, 107 N. Y. 531.

We have examined all the exceptions taken by the defendant on

the trial, and to the conclusions of fact and law of the referee, and find no error in any of the rulings to which exception was taken.

The judgment should be affirmed.

1906. COURT OF CIVIL APPEALS OF TEXAS. [28 S. W. 1001.

NEILL, J.—The appellee and appellant on February [illegible] the substance claimed to be due him for services upon a [illegible] the substance of which, as alleged, may be stated as follows: [illegible] 1903, plaintiff and defendant entered into an oral contract [illegible] the former agreed to work for the latter as a carpenter [illegible] man and superintendent in the erection of fifteen buildings [illegible] nated by numbers, in the city of El Paso, Tex., in consideration of which services the latter promised and agreed to pay him $4.50 per day for his work as a carpenter and 2½ per cent. of the total cost of the buildings, this percentage to be paid upon the completion of the houses; that in pursuance of the contract plaintiff worked as a carpenter and as foreman and superintendent in the construction of nine of the buildings until they were finished, and constructed the foundations for two of the others, and furnished plans for them all, but that on the 15th of September, 1903, the defendant discontinued plaintiff's services under said contract; that the total cost of the buildings erected, including the foundations of the two not completed, was $22,000; [illegible] and [illegible] due him at the rate of $4.50 per day for his work as a carpenter, he [illegible] refuses to pay him the 2½ per cent. [illegible] amounting to $550, for which [illegible] by a general denial and plaintiff [illegible] in the buildings alleged [illegible] and never did have any interest [illegible] that any contract he ever had with said [illegible] representative of T. M. Bowen and [illegible] whose loss they were constructed; [illegible] defendant had no personal interest in the property upon which the buildings were erected, or in any property [illegible] buildings, and knew that there was no reason [illegible] should become individually and personally liable for the [illegible] any debts incident to their construction. This is all [illegible] pertinent to the

[illegible]

the principal where he assumes to contract in making it, where that is unknown to such party.

This proposition is not inconsistent with the general rule that an agent, acting within the scope of his authority and a party advised of his agency, will not be personally charged [illegible] appears, that such was the intention [illegible] Lawrence, 21 N. Y. 390. The disclosure of his agency is not complete [illegible] unless it embraces the name of the principal [illegible] the party dealing with him may understand that he intends to give his personal liability and responsibility to support [illegible] and for its performance. The cases cited by the defendant's counsel, having the relation to the right of [illegible] in favor of a person who has dealt with an agent, whose agency was unknown to such person, have no necessary application to the question now here. In those cases the question arose between the principal and the party dealing with the agent, without [illegible] of his agency, and upon the faith that he was dealing [illegible] account or selling property in his possession, and [illegible] apparently was the owner. And in such cases the right [illegible] property of the agent to set off a claim [illegible] in an action brought by the principal, is [illegible] want of actual knowledge of the agency, [illegible] would have directed a prudent man to inquiry [illegible] or furnish him reason to believe that he [illegible] Wright v. Cabot, 89 N. Y. 570; Nichols v. Morse, [illegible] and cases there cited. This rests upon the principle [illegible] of two innocent parties must suffer loss, it should fall [illegible] furnished the means and opportunity to another [illegible] done by the latter to cause it. The contract of sale [illegible] contract, and while the return of the property to the defendant [illegible] have been a suitable manner of amicably adjusting the matter, the plaintiffs were not legally required to do so. After the goods were purchased by and delivered to them, the plaintiffs had the right to retain them and seek their remedy founded upon [illegible] warranty. Nor is it even now that right is qualified, in [illegible] case, by the fact that the defendant was dealing with the property of others to whom he was required to account for the proceeds of sales made by him. He was, soon after the sale, advised of the claim of the plaintiffs for damages on account of the [illegible] quality of the goods; and if the defendant, as between him and his employers, acted within the authority derived from them in making the warranty, he had the opportunity of seeking indemnity, or [illegible] before he paid over such proceeds to his principals. It is deemed unnecessary to advert more fully to the evidence or [illegible] the facts found by the referee, as it does not appear that the case contains all the evidence: Porter v. Smith, 109 N. Y. 537.

We have examined all the exceptions taken by the defendant on

the trial, and to the conclusions of fact and law of the referee, and find no error in any of the rulings to which they were taken.

The judgment should be affirmed.[1]

BOOK v. JONES.

1906. Court of Civil Appeals of Texas. 98 S. W. 891.

Neill, J.—The appellee sued appellant to recover $550, the balance claimed to be due him by appellant upon a contract, the substance of which, as alleged, may be stated as follows: That in March, 1903, plaintiff and defendant entered into an oral contract by which the former agreed to work for the latter as a carpenter and foreman and superintendent in the erection of fifteen buildings, designated by numbers, in the city of El Paso, Tex., in consideration of which services the latter promised and agreed to pay him $4.50 per day for his work as a carpenter and 2½ per cent. of the total cost of the buildings, this percentage to be paid upon the completion of the houses; that in pursuance of the contract plaintiff worked as a carpenter and as foreman and superintendent in the construction of nine of the buildings until they were finished, and constructed the foundations for two of the others, and furnished plans for them all, but that on the 15th of September, 1903, the defendant discontinued plaintiff's services under said contract; that the total costs of the buildings erected, including the foundations of the two uncompleted, was $22,000; and that, while defendant paid plaintiff the $4.50 per day for his work as a carpenter, he has failed and refuses to pay him the 2½ per cent. upon the cost of the buildings, amounting to $550, for which he sues. The defendant answered by a general denial and pleaded specially that he had no interest or ownership in the buildings alleged to have been erected by plaintiff, and never did have any interest in any of them; that the only connection he ever had with such buildings was as the agent and representative of T. M. Bower and James S. Book, for whom and on whose lots they were constructed; that plaintiff knew that defendant had no personal interest in the property upon which the buildings were erected, nor any property or interest in the buildings, and knew that there was no reason why defendant should become individually and personally liable for the same or any debt incident to their construction. This is as much of the answer pertinent to the

[1] *Accord:* Brown v. Ames, 59 Minn. 476; MacDonald v. Bond, 195 Ill. 122. Where an agent contracts without disclosing his principal, he is not relieved from individual liability by the fact that he afterwards discloses his principal's name. Lull v. Anamosa Nat. Bank, 110 Ia. 537.

assignments of error to be considered as need be stated. The case was tried before a jury who returned a verdict in plaintiff's favor for $348.75, upon which the judgment appealed from was entered.

The first assignment of error is as follows: "The court erred in its general charge wherein the jury was instructed as follows: 'And, if you further believe from the evidence that said W. P. Book did not disclose his agency, then you will find for the plaintiff.' That said charge was erroneous and prejudicial, in this: The evidence showed, or tended to show, that the contract of employment of plaintiff was entered into by and between plaintiff and Mark Miller, and the evidence showed, or at least tended to show, that the plaintiff knew that Mark Miller and T. M. Bower were interested in the ownership of the land upon which said houses designated as in block 900 were erected, and the evidence further showed, or tended to show, that the plaintiff knew that Mark Miller and T. M. Bower were interested in the proposed construction and ownership of the houses, to be erected in said block 900, and that at the time when plaintiff was employed by Miller to work as foreman and superintendent at $4.50 per day the plaintiff did not know and had never met the defendant, W. P. Book. Such being the state of evidence, it was error in the court to charge the jury to find for the plaintiff, unless they believed from the evidence that the said W. P. Book did not disclose his agency; for under said instruction the jury was precluded from the consideration of the evidence showing or tending to show that plaintiff knew that defendant was merely acting as agent." The proposition asserted is that it was error to charge the jury to find for plaintiff unless it believed from the evidence defendant did not disclose his agency. It is an elementary principle of law that, where an agent conceals the fact of his agency and enters into a contract in his own name as the ostensible principal, he may be treated as the principal by the party with whom he deals, and may be held liable on the contract to the same extent as if he were the principal in interest. Sydnor v. Hurd, 8 Tex. 98; Johnson v. Armstrong, 83 Tex, 325, 18 S. W. 594, 29 Am. St. 648; Williams v. Blum (Tex. Civ. App.), 55 S. W. 374. This principle is just, and works no hardship upon the agent, because he has it in his power, if he desires to escape personal liability, to do so by disclosing his principal and contracting in his name. The charge complained of is in accordance with this principle, and is not erroneous.

The second assignment of error is as follows: "The court erred in refusing special charge No. 1 asked by defendant, which was as follows: 'You are charged that before you can find for the plaintiff, you must believe that the defendant expressly agreed personally to pay to the plaintiff (in addition to the per diem of $4.50 per day) 2½ per cent. commission on the total cost of said buildings, and you must further believe from the evidence that the plaintiff

did not know or had any notice of the existence of said property or [illegible] by Miller & Hyatt, and it was [illegible] the facts and circumstances [illegible] which notice if reasonably [illegible] would have disclosed the ownership of said property [illegible] and which [illegible] did find for the defendant [illegible] designed to correct and would have [illegible] the court's general charge on the issue [illegible] for the plaintiff if they believed [illegible] his agency." The [illegible] the special charge [illegible] the general charge [illegible] which tended to show that [illegible] of the fact that defendant [illegible] losses was merely [illegible] appellee was put upon [illegible] latter would not be [illegible] cated in our disposition [illegible] the agent, if he would avoid personal liability, to disclose his agency, and not upon others to discover it, and if he fails to do [illegible] deals with persons unaware of his agency, he must answer personally for the liabilities he contracts (Seymour v. Hood, supra; Baldwin v. Leonard, 30 Vt. 260, 73 Am. Dec. 304; Bickford v. First Nat. Bank, 89 Am. Dec. 430; Appenzellar v. MacNaughton, 114 N. Y. 535, 22 N. E. 1040, 12 Am. St. 851), and if he does not make such a disclosure, the presumption is that he intended to bind himself personally (Raymond v. Squire, 19 Pick. (Mass.) 487; Cobb v. Knapp, supra; [illegible] held in Argenbright v. [illegible] to turn over to his customer [illegible] known principal, might have [illegible] benefit of any available [illegible] founded upon the contract." The [illegible] reversed.

This disposes of all the [illegible] allowance of the judgment.

Affirmed.

did not know or had no notice of the ownership of said property in block 900 by Miller & Bower, and if you believe that under all the facts and circumstances that the plaintiff was put upon notice, which notice, if reasonably followed up by inquiry, would have disclosed the ownership of said property to be in Bower and Miller, you will find for the defendant'—for the reason that said charge was designed to correct, and would have corrected, the error in the court's general charge, to the effect that the jury should find for the plaintiff if they believed that said W. P. Book did not disclose his agency." The contention of appellant is that the refusal of the special charge embraced in the assignment was error, because the general charge precluded the jury from considering the evidence which tended to show that plaintiff knew or was put upon notice of the fact that defendant's connection with the construction of the houses was merely that of an agent. If it should be conceded that appellee was put upon notice of the fact of appellant's agency, the latter would not be relieved from the operation of the rule enunciated in our disposition of the first assignment. The duty is upon the agent, if he would avoid personal liability, to disclose his agency, and not upon others to discover it, and if he fails so to do, and deals with persons unaware of his agency, he must answer personally for the liabilities he contracts (Sydnor v. Hurd, *supra.;* Baldwin v. Leonard, 39 Vt. 260, 94 Am. Dec. 324; Bickford v. First Nat. Bank, 89 Am. Dec. 436; Argersinger v. MacNaughton, 114 N. Y. 535, 21 N. E. 1022, 11 Am. St. 687); and, if he does not make such a disclosure, the presumption is that he intended to bind himself personally. Raymond v. Crown & E. Mills, 2 Metc. (Mass.) 319; Cobb v. Knapp, 71 N. Y. 349, 27 Am. Rep. 51. As is held in Argersinger v. MacNaughton, supra*:* "To permit an agent to turn over to his customer an undisclosed, and to the latter unknown, principal, might have the effect to deny to the customer the benefit of any available or responsible means of remedy or relief founded upon the contracts." The requested charge was properly refused.

This disposes of all the assignments of error and requires an affirmance of the judgment.

Affirmed.

AMANS v. CAMPBELL.

1897. Supreme Court of Minnesota. 70 Minn. 493.

Mitchell, J.—This was an action to recover personal judgment against the defendant Campbell for services in a logging camp, and to have the amount adjudged a lien on the logs which belonged to the defendant lumber company; but the questions presented by this

appeal relate exclusively to plaintiff's right of action against Campbell.

The undisputed evidence is that Campbell personally employed plaintiff; that neither at the time of making the contract nor during the times plaintiff was performing the services did he disclose any agency, unless it was by the use of the name of "Campbell & Co." in the written contract (Exhibit A) which he procured from plaintiff, and in the signature of time checks which he issued to the plaintiff and other laborers in the camp; that in using this name he in no way indicated that he was agent for some one else, or that he himself was not "Campbell & Co.," or the Campbell of "Campbell & Co.," unless such facts were indicated by the use of the name itself; that from start to finish he was the only person who appeared in connection with the business, and had to all appearances the exclusive management and control of it, precisely as if he himself had been the principal.

Neither at the time of making the contract nor while performing it had plaintiff any knowledge or notice of any agency, or that Campbell was not the principal, unless he was chargeable with such notice by the fact that Campbell used the name "Campbell & Co." in the contract (Exhibit A) and in signing time checks to workmen. While one of the members of the lumber company testified that he knew that "Campbell & Co." meant Delia Campbell, the wife of the defendant Campbell, and that he thought that people generally throughout the community knew that fact, yet there is not a single fact in evidence tending to support that opinion. It had been testified to that the "firm" of "Campbell & Co." consisting of Delia Campbell alone, had existed for about three years, but there was no evidence that she had ever conducted any business under that name, unless it was the logging operations during the winter of 1896-97 at the camp at which the plaintiff was employed; and it appears that even in that business she never appeared or took any part in person.

The defense interposed in this action was that "Campbell & Co." was Delia Campbell, and that the defendant Campbell was merely her agent. There is much in the evidence tending to show that defendant himself was in fact "Campbell & Co." But assuming that in fact he was merely an agent for his wife, the case was, upon the evidence, one for the application of the rule that a person acting as the agent for another will be personally responsible if, at the time of making the contract in his principal's behalf, he fails to disclose the fact of his agency; that by reason of such failure he becomes subject to all the liabilities, expressed or implied, created by the contract, in the same manner as if he were the principal in interest. 1 Am. & Eng. Ency. Law (2d ed.) 1122, and cases cited.

The case is one not merely of an undisclosed principal, but of an undisclosed agency. The fact that the defendant used the name of "Campbell & Co.," but without indicating in any way that he did

[illegible] agent, and was at his own business risks, did not render the [illegible] liable to a creditor of an agent. There was nothing in this to indicate that he was not "Campbell & Co." or the Campbell or "Campbell & Co." The name might probably suggest that there were others associated with him in partnership, but we think that would be all. If there had been a firm consisting of members other than defendant using names under that name, generally known as such in the community, a difficulty in case would be presented. In such case knowledge of the fact of defendant's agency might be chargeable to the plaintiff.

None of the cases cited by defendant's counsel seem to us to be in point. In Preston v. Neilinger, 46 Fed. 580, so much relied on by counsel, the question concerned with the selling power in relation to persons, and not with the party whom he should be held liable.

The other authorities cited by defendant's counsel it is unnecessary to consider, as the other assignments of error do not relate to the points raised by them, and we are clearly upon the general issue which we have considered that the case should be decided.

Order affirmed.

FOURCEST v. McCARTHY.

(1891. Supreme Court, Special Term, City of N. Y. 16 N. Y. Supp. 813.)

Leave granted, etc.—The plaintiff in this action seeks to charge the defendant as principal on the ground that he failed to disclose the fact that he was acting merely as a commission agent. The suit is brought to recover for the loss of certain articles placed with the Continental Storage Warehouse. All preliminary interviews were had with the defendant, personally or through the post-office or telephone messages. It appears that he introduced the plaintiff's clerk to the president of the proprietors of the Continental Storage Warehouse, who assumed the charge of the premises. It appears that it was the understanding that these facts were at the time of the transaction directly communicated to the plaintiff. The [illegible] relations existing between the defendant, and under the principle [illegible] agent, he would be liable as a principal. Dresbach v. Fisher, 17 Week. Dig. 201; Winston v. Pilcher, [illegible]

[illegible] the question of fact [illegible] and [illegible] the [illegible] to [illegible] and [illegible] [illegible] [illegible]

so as agent, and not as his own business name, did not, under the circumstances, amount to a disclosure of an agency. There was nothing in this to indicate that he was not "Campbell & Co." or the Campbell of "Campbell & Co." The name might probably suggest that there were others associated with him as partners, but we think that would be all. If there had been a firm consisting of members other than defendant doing business under that name, generally known as such in the community, a different case would be presented. In such case knowledge of the fact of defendant's agency might be chargeable to the plaintiff.

None of the cases cited by defendant's counsel seem to us to be in point. In Preston v. Foellinger, 24 Fed. 680, so much relied on by counsel, the plaintiff contracted with the actual party in interest in person, and not with the party whom he sought to hold liable.

The view we have taken of the case renders it unnecessary to consider any of the other assignments of error, as none of the points raised by them have any bearing upon the ground upon which we have concluded that the case should be decided.

Order affirmed.[1]

FORREST v. McCARTHY.

1899. Supreme Court of New York. 61 N. Y. Sup. 853.

Leventritt, J.—The plaintiff in this action seeks to charge the defendant as principal on the ground that he failed to disclose that he was acting merely in a representative capacity. The suit is brought to recover for the loss of certain articles stored with the Continental Storage Warehouse. A preliminary interview was had with the defendant, pursuant to which the goods were sent for storage. It appears that the defendant was simply a clerk in the employ of the proprietors of the Continental Storage Warehouse, who were also the owners of the premises it occupied; but it does not appear that these facts were, at the time of the bailment, directly communicated to the plaintiff. The transactions were conducted entirely by the defendant, and, unless the plaintiff was aware that he was merely an agent, he would be liable as a principal. Brockway v. Allen, 17 Wend. 42; Whitman v. Johnson, 10 Misc. 725, 31 N. Y. Supp.

[1] "The law imposes no duty on the plaintiff, in dealing with the defendant, to inquire and ascertain whether or not the defendant was acting as an agent, in order to fix a liability on the defendant. On the contrary, it was the duty of the defendant in dealing with the plaintiff, if it were acting as the agent of another, in order to escape liability, to have informed the plaintiff of its agency." Dowdell, J., in Armour Packing Co. v. Vietch-Young Produce Co., (Ala.), 39 So. 680, 683.

1009; Cobb v. Knapp, 71 N. Y. 348. Her own testimony, however, clearly indicates that she was consciously dealing with him as the representative of the Continental Storage Warehouse. She testifies to previous dealings with the same concern, and to a similar contract, made through the defendant's predecessor, whom she refers to by name, and explicitly identifies as the then "manager" of the warehouse. She likewise designates the defendant as the manager during the time of the arrangements here under consideration. From her statements, and from a letter introduced in evidence, she knew that she was dealing with a concern known as the Continental Storage Warehouse, and her admissions negative the idea of a contractual relation with the defendant. Under these circumstances the justice was right in holding that the proper party defendant was not before the court.

Judgment affirmed, with costs to the respondent. All concur.[1]

COBB v. KNAPP.

1877. Court of Appeals of New York. 71 N. Y. 348.

Church, Ch. J.—This was an action for the purchase-price of a quantity of wheat alleged to have been sold by the plaintiff to the defendant. The defense was that the defendant purchased the wheat as agent or broker for C. A. Steen & Co. It seems to have been conceded that the defendant did in fact purchase the wheat, as a broker for the firm named, who were his principals, and the main contention on the trial was whether the defendant at the time of the purchase disclosed his principals, and whether he made the purchase in his own name and upon his own responsibility. The only exception in the case is upon a refusal to grant a non-suit, and a request to direct a verdict for the defendant. The court charged the jury that a broker, although acting for another, makes himself personally liable if he contract in his own name, and without disclosing the name of his principal, and that this would be so, although the seller supposed at the time that he was acting as a broker or agent for another; that the subsequent disclosure of the principal, and the commencement of an action against him by the seller, would not discharge the broker from personal liability. There were no exceptions to the charge, and I do not understand that the learned

[1] "It is quite immaterial whether the agent disclose his character or his principal himself, if it be actually known at the time to the other party. For in such a case the agent will not be bound, unless he enter into such a contract as will bind him at all events." Scates, J., in Chase v. Debolt, 7 Ill. 371, 374.

[illegible] Cobb v. Knapp, 71 N. Y. 348. Her own testimony, however, clearly indicated that she contracted neither with him as the representative of the Continental Storage Warehouse. She testifies to previous dealings with the same concern, and to a similar contract made during the defendant's presidency, whom she refers to by name, and explains identifies as the then "manager of the warehouse." She likewise designates the defendant as the manager during the time the arrangements were under consideration. From her statements and from a letter introduced in evidence, she knew that she was dealing with a concern known as the Continental Storage Company, and her admissions negative the idea of a contract with the defendant. Under these circumstances the judge was right in holding that the proper party defendant was not before the court.

[illegible] affirmed, with costs to the respondent. All concur.

COURT OF APPEALS.

In the Matter of the Application of the Mayor, etc., of the City of New York, 71 N. Y. 348.

[illegible] to secure for the purchase-price of a [illegible] to have been sold by the plaintiff to the defendant. [illegible] was that the defendant purchased the wheat [illegible] by C. A. Suter & Co. It seems to have been conceded that [illegible] did in fact purchase the wheat, for a broker [illegible] who was his principals, and the main controversy [illegible] the wheat [illegible] the defendant at the time of the purchase disclosed [illegible] principals and whether he made the purchase [illegible] upon his own responsibility. The only exception [illegible] a refusal to grant a non-suit, and a request to direct a verdict for the defendant. The court charged the jury that a [illegible] acting for another makes himself personally liable [illegible] his own name, and without disclosing the name of [illegible] and that this would be so, although the seller supposed [illegible] was not acting as a broker or agent for another [illegible] knowledge of the principal, and the commencement [illegible] action against him by the seller, would not discharge the [illegible] liability. There were no exceptions to the charge [illegible] understand that the learned

[1] [illegible] character as [illegible] knowledge of [illegible] law to the other party. So in such a case [illegible] will not [illegible] to plead and prove such [illegible] contract as will bind him. [illegible] v. Crane v. Odell, 7 Hill, 97, 104.

counsel for the appellant claims that it was erroneous in these respects; but he insists, from the facts appearing in the case, a nonsuit should have been granted or verdict ordered for the defendant. There was a sharp conflict of evidence between the parties as to what took place at the time of the contract. This court has no power to review the facts any farther than to ascertain whether they are sufficient upon any construction, which the jury were authorized to give them to justify a verdict, and whether any fact was conclusively proved which, as matter of law, entitled the defendant to a verdict. The credibility of witnesses, the construction of ambiguous evidence, and in general inferences to be drawn from circumstances, are exclusively for the jury. These views have been so often reiterated by this court, that it seems idle to refer to them, and quite unnecessary to cite authorities to sustain them. It it natural that parties, who feel aggrieved by verdicts, should struggle to have what they regard as injustice remedied, and hence it is the almost daily experience of this court to have questions of fact pressed upon our attention in some form as questions of law, while, except in a few cases, the review of facts is confined by statute to the special and general terms of the courts below. Our jurisdiction is fixed by the constitution and the statute, and we have no authority to depart from their limitations. In this case the evidence of the defendant, which was to some extent corroborated, if true, established clearly a case of non-liability. He testified that he purchased the wheat for Steen & Co., and so informed the plaintiff, and that it was understood that Steen & Co. was to pay the purchase-price, and that the plaintiff did not make any claim against him at the time, nor for several years afterwards. But for the purpose of determining whether it was a legal error to deny the motion for non-suit, we must take the evidence of the plaintiff. If that was sufficient to sustain the action, the jury had a right to adopt it. The plaintiff testified that not only was the principal not disclosed, but that the defendant expressly purchased the wheat on his own credit, and directed that it be charged to him; that it was charged to him, and a bill made against him, which he repeatedly promised to pay. If the jury adopted the plaintiff's evidence, it made clear a case of liability. (Story on Agency, §§ 266, 267; 44 N. Y. 349.) It is argued that because the defendant stated that the property was for "Blissville Distillery," and was to be delivered there, that was a sufficient disclosure of the principal, but this is not conclusive. The plaintiff states that he did not know the proprietors of the distillery, and that the defendant directed the property to be charged to him.

The case of Waddell v. Mordecai (3 Hill [South Carolina Rep.] 22), is cited. That was an action against the defendant to recover $100 paid on a contract executed by the defendant as agent of a brig, and signed "M. C. Mordecai for the owners." The agent

had paid the money to his principals before the commencement of the action, and the court held that the plaintiffs could not recover. The learned judge who delivered the opinion reasoned that the disclosure was sufficient, but put the decision upon the ground mainly, that it appearing that the defendant had acted in good faith and delivered the money to his principals, the equitable action for money had and received could not be sustained. The general current of authority is against the sufficiency of such a signing to relieve the agent from liability, but it is unnecessary to express an opinion of its correctness, because in this case the agent, if the plaintiff's evidence is to be credited, contracted expressly on his own credit. The other case depended on is Southwell v. Bowditch (1 Law Rep. [Com. Pleas Div.] 100, and same case on appeal, p. 374). The contract signed by the defendant was: "I have this day sold by your order, and for your account to my principals, five tons," etc. The common pleas division held this to be a contract of purchase by the broker, and that he was liable. The court of appeals reversed the decision, holding that it was a contract of sale by the broker, and not of purchase, and that it must be construed according to its tenor like other contracts.

This decision does not aid the defendant.

The case of Raymond v. The Proprietors of the Crown and Eagle Mills (2 Met. 319), is in point for the plaintiff. The agent purchased goods saying they were for C. & E. Mills, and ordered them to be so marked. They were charged to the agent. The C. & E. Mills were a corporation. At the trial the judge charged that these facts were not conclusive evidence of the knowledge of the plaintiffs, that R. was the agent, and the Crown and Eagle Mills the principal, and the supreme court sustained the decision, holding that the language was ambiguous, and was properly left to the jury. Here the distillery named was not a corporation, and its name, therefore, conveyed no idea of its owners. It is not sufficient that the seller may have the means of ascertaining the name of the principal. If so, the neglect to inquire might be deemed sufficient. He must have actual knowledge. There is no hardship in the rule of liability against the agents. They always have it in their own power to relieve themselves, and when they do not, it must be presumed that they intend to be liable.

The subsequent disclosure of the principals by the agent, and the commencement of an action against them is not conclusive of an election to hold them responsible only. (2 Met., *supra;* 10 [Queen's Bench L. R.] 57.) In the recent case of Beymer v. Bonsall (79 Pa. R. 298), it was held that neither the agent nor principal in such a case would be discharged short of satisfaction. The fact of commencing the action and the statements in the complaint were proper for the jury upon the contested fact, but they did not operate as a legal discharge. It was claimed by the plaintiff that the action

was erroneous upon the evidence in the case, that a certain responsible person, a member of the firm of Steen & Co., which was mutual, was present and did not discharge the defendant.

The case was properly submitted to the jury, and if the result is wrong, it was the error of the jury. We are unable to find any exception in the case involving a reversal of the judgment, and it must be affirmed.

All concur.

Judgment affirmed.

[1] See Greenberg v. Tatonetti, [illegible]

had paid the money to his principals before the commencement of the action, and the court held that the plaintiff could not recover. The learned judge who delivered the opinion remarked that the disclosure was sufficient, but put the decision upon the ground mainly, that it appearing that the defendant had acted in good faith and conveyed the money to his principals the equitable action for money had and received could not be sustained. The general current of authority is against the correctness of such a ruling to relieve the agent from liability, but it is unnecessary to express an opinion of its correctness, because in this case the agent, if the plaintiff's evidence is to be credited, did not act merely on his own credit. The other case demanded [Scrutevell v. Pondesby (1 Law Rep. [Com. Pleas Div.] 100; same case on appeal, p. 374). The contract signed by the defendant read: "I have this day sold by your order and for account of the principals, five tons," etc. The common pleas division held this to be a contract of purchase by the defendant, and he was liable. The court of appeals reversed the decision, holding that it was a contract of sale by the broker, and construed it that it must be construed accordingly to its terms.

for defendant.

The proprietors of the Crown and Eagle [illegible] for the plaintiff. The agent purchased the wool of C. & E. Mills and ordered them [illegible] charged to the agent. The C. & E. Mills made a [illegible]. At the trial the judge charged that these facts were not sufficient evidence of the knowledge of the plaintiffs that E. was [illegible] for the Crown and Eagle Mills the principal and the supreme court sustained the decision, holding that the language was ambiguous and was properly left to the jury. Here the [illegible] of a corporation, and its name, therefore, [illegible] by its agents. It is not sufficient that the seller may have the means of ascertaining the name of the principal. If so, the [illegible] would be deemed sufficient. He must have actual knowledge. There is no hardship in the rule of liability against the agent. They always have it in their own power to relieve themselves, and when they do not, it must be presumed that they [illegible] the risk.

The subsequent [illegible] by the agent, and the commencement of an [illegible] against him, is not conclusive of an election to hold them responsible. [Citing Wyld v. Queen's Bench L. R.] 5 Q. B. 39. In the recent case of Kinder v. Bonsall (79 Pa. St. 298) it was held that a verdict in favor of the principal in such a case would be discharged from all responsibility. The fact of commencing the action and the allegations in the complaint were proper for the jury upon the undisclosed fact, but they did not operate as a legal discharge. It was claimed by the plaintiff that the action

was commenced upon the representation of the defendant, that a certain responsible person was a member of the firm of Steen & Co., which was untrue; but, however this was, it did not discharge the defendant.

The case was properly submitted to the jury, and if the result is wrong, it was the error of the jury. We are unable to find any exception in the case justifying a reversal of the judgment, and it must be affirmed.

All concur.

Judgment affirmed.[1]

[1] See Greenburg v. Palmieri, 71 N. J. L. 83, *supra*, page 489.

CHAPTER XI.

DUTIES AND LIABILITIES OF PRINCIPAL TO AGENT.

Section 1.—Duty to Compensate Agent.

(a) IN GENERAL.

FIRST NATIONAL BANK OF CLEBURNE v. GRAHAM.

1889. COURT OF APPEALS OF TEXAS. 22 S. W. Rep. 1101.

WHITE, P. J.—Appellant, having recovered a judgment against appellees Graham & Lewis, made affidavit of and sued out a writ of garnishment against Deal. Deal answered the writ, stating that he was indebted to the defendant Graham, one of the firm of Graham & Lewis, in the sum of $144.10, but which indebtedness he pleaded was exempt from garnishment, because the same was an attorney's fee due for personal legal services rendered as an attorney at law. This plea was sustained by the court, who rendered judgment discharging the garnishment, and for costs against appellant.

By the twenty-eighth section of the state constitution (article 16) it is declared that "no current wages for personal services shall ever be subject to garnishment;" and article 218, Rev. St., provides that "no current wages for personal services shall be subject to garnishment; and, where it appears upon the trial that the garnishee is indebted to the defendant for such current wages, the garnishee shall, nevertheless, be discharged as to such indebtedness."

The question is, is an attorney's fee for services rendered as an attorney "such current wages for personal services" as comes within the constitutional and statutory exemption? "Current" means "running; now passing or present in its progress;" and "wages" means "a compensation given to a hired person for his or her services." Webst. Dict. We think the proper construction to be placed then upon the term "current wages," is that they are such compensation paid for personal services as are to be paid for periodically, or from time to time, as the services are rendered, or the work is performed—progresses. It is where the party hired, by rendering the service, would be entitled to certain periodical pay-

Section 1.—Duty to Co[illegible]

ments. It is a service rendered for which the compensation is measured by the time of its continuance, (Jenks v. Dyer, 102 Mass. 235; Somers v. Keliher, 115 Mass. 165); such compensation as in fact is paid for services where rendered by the hour, day, week, month, or year. In the use of the word "current" as prefixed to "wages," our constitutional and statutory provisions differ from such exemptions in most of the states. See Freem. Ex'ns, § 234; McLellan v. Young, 54 Ga. 399; Flood v. Randall, 72 Me. 489; Allen v. Russel, 78 Ky. 105; Railroad Co. v. Barron, 83 Ill. 365; Railroad Co. v. Falkner, 49 Ala. 115. Signification must be given it, as well as the word "wages." In fact it limits, restricts, and qualifies the character of the wages for personal services, which it is the spirit and intent and policy of the law to exempt from garnishment. No wages not "current" are so exempt. Can an attorney's fee for legal services rendered or to be rendered in a single case, or in the transaction of a single matter, or in the transaction of any amount of legal business, in any manner be correctly termed "current wages," where he has not been hired for his services by the day, week, or month, to be paid at the expiration of the time for which he was hired, and not in proportion to the business done? We think not. Our conclusion is that the court below erred in holding that the attorney's fee due from appellee Deal, the garnishee, to the defendants, was exempt from garnishment.[1] * * *[2]

HINDS v. HENRY.

1873. Supreme Court of New Jersey. 36 N. J. L. 328.

Depue, J.—Upon the facts set out in the foregoing statement of the case, the plaintiff brought his action against the defendant to recover compensation for his services in negotiating the sale. At the circuit, the cause was tried by the court—a jury being waived—and the finding of the court was in favor of the defendant. The rule to show cause presents the question of the propriety of this finding, under the testimony produced before the court.

The declaration contains the common counts for work and labor,

[1] A portion of the opinion dealing with the sufficiency of the affidavit for garnishment is omitted.

[2] See Heard v. Crum, 73 Miss. 157.

In Hamberger v. Marcus, 157 Pa. St. 133, the exemption statute read as follows: "The wages of any laborer or the salary of any person in public or private employment shall not be liable to attachment in the hands of the employer." The court decided that a broker's commissions were not exempt from attachment under this statute.

and services performed, and also a special count on the obligation of March 29, 1867.

The plaintiff is not entitled to recover under the common counts. To entitle a broker to commissions for his services in negotiating a sale, the services must be rendered under an employment and retainer by his principal. Services rendered as a mere volunteer, without any employment, express or implied, will give no title to commissions. Edwards on Factors and Brokers 144; Cook v. Welch, 9 Allen 350. If the employment be by special agreement, the rights and liabilities of the parties will be determined by the terms of the agreement exclusively. Russell on Factors 155; Bower v. Jones, 8 Bing. 65; Warde v. Stuart, 1 C. B. (N. S.) 88; Jacobs v. Kolff, 2 Hilton 133.

The employment of the plaintiff to negotiate a sale was by the first agreement between the parties, which was made on the 6th of December, 1866. In express terms, the power to sell was limited to the 15th of January, 1867. The subsequent extension enlarged the time until the 15th of March. On this latter day, the authority of the plaintiff and his employment terminated by the limitation in the agreement of the parties. The contract for the sale was made with Laubach and Reigel, on the 28th of March. The case does not disclose any agreement, express or implied, between the parties, for continuing the plaintiff's agency after the former agreement had expired. Consequently, the authority of the plaintiff was at an end when the contract with the purchasers was made. For services (if any) which the plaintiff had rendered toward the contract of sale, whilst the original employment subsisted, he could not have recovered for the reason that, under the agreement then in force, a sale on a day not later than the 15th of March, was a condition precedent to the obligation of that agreement. After the lapse of that time, the employment of the plaintiff ceased, and thereafter he acted as a volunteer, with no power to represent the defendant, or to conclude a contract in his name, except such as was derived from the subsequent ratification of his acts by the defendant. The plaintiff testifies that the contract for sale was executed by himself, as the agent of the defendant, and by Laubach and Reigel, in duplicate, on the day it bears date, and that he delivered one copy to the defendant on the next day, when the obligation sued on was executed and given to him. The acceptance by the defendant of the contract to sell, made in his name by the plaintiff, as his agent, and the recitals in the obligation were an adoption of the contract, which made it binding on the defendant, as between him and the purchasers, but did not operate to confer upon the plaintiff any right other than such as is expressed in the obligation that was then executed. The parties in that instrument put in writing the understanding and agreement as between themselves. If any other engagements had previously existed, they were merged in this agreement. It is mani-

fest that, independently of the obligation of March 29, 1867, the plaintiff can have no right of action against the defendant, under either the common counts, or any other form of pleading.

The special count is founded on this obligation. Can the plaintiff under the evidence in the cause recover upon it? The general rule is that the right of the broker to commissions is complete, when he has procured a purchaser able and willing to conclude a bargain on the terms on which the broker was authorized to sell. When such a purchaser is produced, the principal cannot defeat the agent's right to compensation by a refusal, without sufficient reason to fulfill the agreement which the agent had power to make. Prickett v. Badger, 1 C. B. (N. S.) 296; Lockwood v. Levick, 8 *id.* 603; Kock v. Emmerling, 22 How. 69; Cook v. Fiske, 12 Gray 491; Glentworth v. Luther, 21 Barb. 145. This rule rests upon the general usage of the business, and is liable to be modified or superseded by a special usage in relation to the particular transaction, in connection with which the broker was employed, or by special agreement between the parties. Thus, in London, by the established usage, a ship broker negotiating the hiring of vessels, is not entitled to commissions until the chartering is completed, and cannot recover compensation unless the charter party is signed, even though the negotiation was rendered fruitless by the fault of the employer. Read v. Rann, 10 B. & C. 438; Broad v. Thomas, 7 Bing. 99; Dalton v. Irvin, 4 C. & P. 289.

The broker may also, by special agreement with his principal, so contract as to make his compensation dependent on a contingency which his efforts cannot control, even though it relate to the acts of his principal. A contract of that character is binding, and no action can be maintained until the contingency has arisen. Bull v. Price, 7 Bing. 237; Alder v. Boyle, 4 C. B. 635; Moffat v. Laurie, 15 C. B. 583; Tombs v. Alexander, 101 Mass. 255; Walker v. Tirrell, *ib.* 257. In Bull v. Price the retainer was for the negotiation of the sale of a reversionary interest for a compensation of two per cent. on the sum obtained. The property was sold by the broker, and the proceeds paid into court, from which they could only be obtained by an application, and were subject to a deduction for costs, and the value of an annuity charged on the estate. It was held that an action before the money was got out of court, was commenced too soon. In Alder v. Boyle, upon a negotiation between A and B for an exchange of advowsons, the defendant agreed to pay the broker £100, "one-third down and the remaining two-thirds when the abstract of conveyance is drawn out." The defendant delivered the abstract of his title, but no abstract was delivered by the other party, and nothing further being done the negotiation dropped. In an action by the broker for the last payment of two-thirds of his commissions, it was decided that the action could not be maintained

—the event, on the happening of which the plaintiff's right to that portion of the compensation agreed on, not having occurred.

By the contract in this case, the defendant obligated himself to pay the commissions agreed on—one-half at the time the purchasers of the property should pay the first half of the purchase money, and the balance at the expiration of one year from the date of the deed, without interest. In an action on an obligation of this kind, the pleader must aver, and it must be proved at the trial, that the contingency on which the debt is payable has happened, or that it was defeated through some fault of the obligor. Holdipp v. Otway, 2 Saunders 106; Walker v. Tirell, 101 Mass. 257; Moffatt v. Laurie, 15 C. B. 583. The contingency on which the plaintiff's compensation was dependent has never arisen. To excuse the absence of proof on this subject, the plaintiff relies on a class of cases which hold that the obligee is relieved from the necessity of proving performance of the condition, where performance has been prevented by the act of the obligor. The cases on this subject are quite numerous. Malins v. Freeman, 4 Bing. (N. S.) 395; Doe v. Bancks, 4 B. & Ald. 401; Planche v. Colburn, 8 Bing. 14; Hall v. Conder, 2 C. B. (N. S.) 22; Inchbald v. The Western Co., 17 *id.* 733; Horler v. Carptnter, 2 *id.* 56; Young v. Hunter, 2 Seld. 204; Hurlstone on Bonds 49. But they will be found, without exception, to be cases in which the obligee has prevented the performance of the condition by some wilful or fraudulent act, in violation of his own undertaking, express or implied.

In the present case, the cloud on the defendant's title, which ultimately broke off the contract to sell, was made known to the plaintiff when the power of attorney was given. The time when the title might be perfected was the subject of a letter, written by the defendant's father to the plaintiff, bearing date on the 20th of February, in which he says: "I left for Wilkesbarre to ascertain when, to a certainty, the title can be completed, and I dare say it will not be safe to say earlier than May 1st next, although it may be sooner." With this knowledge of a condition of the title that might create difficulty, the plaintiff concluded a contract for sale, binding the defendant to convey, on the 1st of May, in fee simple, clear of all encumbrances. At the time of these transactions, it was expected that the suit in which the validity of the tax title was to be determined would be tried at the following April term. It was laid over at that term in good faith, on account of the non-return of a commission, taken out for the examination of an important witness in a foreign country, and was not finally disposed of until February, 1868. When the obligation sued on was signed, the pending litigation was referred to. The plaintiff testified that the defendant then said, that if there was any likelihood of his losing the suit he would buy the parties off. At the time fixed for making the deed, the defendant's counsel exhibited to the counsel of the purchasers the proof—by the produc-

tion of receipts for the taxes—that the tax title was worthless; and the clear weight of the evidence is, that the defendant offered to convey, leaving with the purchasers sufficient of the purchase money to indemnify them for any loss arising from an adverse termination of the litigation, or to convey the residue of the lands, omitting the tract which was in controversy. The purchasers declined to accept anything but an unclouded title, and the contract with them fell through.

The evidence shows that defendant made no fraudulent concealment of the defect in his title, and that the plaintiff acted with full knowledge that his efforts might be made abortive by the defendant's inability to convey as was stipulated. The sale fell through, not in consequence of any default of the defendant, but was defeated by the occurrence of a contingency, the possibility of the happening of which was known to both parties, and with respect to which they expressly contracted.

The result in the court below was correct, and the rule to show cause should be discharged.[1]

JONES v. WOODS.

1874. Supreme Court of Pennsylvania. 76 Pa. St. 408.

This was an action of assumpsit, brought June 5, 1871, by Robert Woods and Stephen Woods, partners, as R. & S. Woods, against Nelson Jones.

The declaration was, in the first count, for the "sum of $500, the price and value of work, viz., professional services," etc.; in the second, for $500, money received by defendant for plaintiffs' use; in the third, for $500, money paid, etc., by plaintiffs for defendant; in the fourth, for $500, found to be due by defendant to plaintiffs on an account stated. The damages were laid at $1,000.

Robert Woods, one of the plaintiffs, testified that he had been employed, with the late Judge Hepburn, by Thomas Jones, Nelson Jones and Pressley Jones, in relation to a sale of their property to the Pittsburg & Steubenville Railroad Company; the company having bought their property for $66,000, made a payment of $5,000, and

[1] "The right to compensation arises from the parties having placed themselves in the relative positions of employer and employed, and assumed respectively the obligations and duties belonging to those positions." Cooley, J., in McDonald v. Boeing, 43 Mich. 394, 396.

Where the contract of employment specifies that in a certain contingency no compensation is to be paid, a promise to pay will not be implied by law if the contingency happens. Zerrahn v. Ditson, 117 Mass. 553.

failed to pay the balance. The plaintiffs obtained a decree against the company for the money due on the original purchase, and after much litigation the money was obtained, and Nelson Jones, defendant, received his proportion from the railroad company. The witness said: "During all the time I was attorney for those three parties, I never heard a breath to the contrary from them or any one else." He further testified as to the amount and character of his services and their value. Thomas Jones was the principal man; the defendant would sometimes meet him and ask him how they were getting along; the parties, except Nelson Jones, paid their share of plaintiffs' fees.

On cross-examination he testified:

"Mr (Nelson) Jones spoke to me occasionally and asked me how we were getting along with the suit. Judge Hepburn and I got up the title of the suit, and Nelson Jones signed it. The suit was brought in the name of Thomas Jones, Nelson Jones and Pressley Jones; all signed the bill, and I appeared for them all. At different times, when one would die, I would suggest the death and put the names of the heirs upon the record. Mr. Nelson Jones knew of the proceedings all the time, all the way through; and whenever it was necessary took part in it." Nelson Jones was at plaintiffs' office several times in relation to the case; witness entered charges in his book against all three parties for professional services in relation to this business. Thomas Jones called on him first in relation to the case; he thought he saw Nelson Jones at that time too. He further said: "Mr. Nelson Jones certainly was my client as much as any gentleman I ever appeared for, and the idea that he disapproved of that proceeding is entirely new. I do not know that I asked him for the money, but I told him he ought to pay me his share of those fees. After he got his money from Stone, the property sold and everything straight, I thought I ought to have some fees from him, although I did not get any. I dropped his name out of that proceeding, although it enured to his benefit. I knew that he and his brother sometimes were not on very good terms, but Thomas attended to his own business and Nelson's too. Thomas managed the affairs of the whole estate."

There were other witnesses, who testified to the performance of the professional services by the plaintiffs, and as to their value.

Nelson Jones, the defendant, testified that he had never employed the plaintiffs in the business for the services for which this suit was brought; he never talked with them about it, except to ask how they were getting along; nor authorized them to institute proceedings in his name; he had other counsel; never talked to plaintiffs about his business, or authorized his brother Thomas to commence these proceedings or employ counsel.

The defendant's second point with its answer was:

2. If the jury believe that Thomas Jones employed the plaintiffs to conduct the case and attend to the business, as testified to by de-

fendant, then the plaintiffs should look to Thomas Jones for payment, and if there is any liability on the part of the defendant in this case, it is to Thomas Jones, for contribution or otherwise, and not to the plaintiffs.

Answer: "Affirmed, if the jury believe that the services were for the benefit *alone* of Thomas Jones. But if they find that the retention and services of counsel were for the benefit of *all* the heirs, and enured to the advantage of all, and all, the defendant included, were aware of the fact, then all of them are liable, and all should be made to pay for the services so resulting to their general benefit and advantage."

The jury, April 19, 1872, found for the plaintiff $1,500.

On the 27th of April, 1872, by leave of the court, the plaintiff amended their declaration by making the amount in each court $2,000 and the damages $4,000.

The defendant took a writ of error and amongst others, assigned for error the answer to his second point, and allowing plaintiff to amend his declaration.

SHARSWOOD, J.—We are of the opinion that the learned court below erred in the answer to the defendant's second point; not that the defendant was entitled to an absolute and unqualified affirmance of it, for upon the testimony of the plaintiff, the jury might have been justified in finding that Nelson Jones had recognized and ratified the employment of the plaintiff as counsel for himself and his brothers. One of the plaintiffs had testified that the defendant spoke to him occasionally; that the suit was brought in the name of Thomas Jones, Nelson Jones and Pressley Jones; all signed the bill and he appeared for them all. Mr. Nelson Jones knew of the proceedings all the time, all the way through, and whenever it was necessary took part in it. Mr. Nelson Jones, on the contrary, denied that he had authorized or ratified the employment. Of the affirmance, however, the plaintiff in error could not have complained, but the court proceeded to qualify and explain it in a way that was well calculated to mislead the jury and turn their attention aside from the true question in the cause. In instructing the jury that if they should find that the retention and services of counsel were for the benefit of all the heirs, and enured to the advantage of all and all, the defendant included, were aware of the fact, then all of them are liable, and all should be made to pay for the services so resulting to their general benefit and advantage, there was manifest error. A voluntary service rendered by one man to another, without any precedent request, or subsequent promise, forms no ground of action. It is true that such precedent request will often be inferred from the work being done under the defendant's eye and for his benefit. But that is necessarily an inference of fact to be made by the jury from all the evidence. There were circumstances in the case which tended to show that after the sheriff's sale and the end of the equity

case, the plaintiff dropped the name of Nelson Jones from the proceedings and no longer considered himself as his counsel. Yet the learned judge left it to the jury, if they found that the plaintiff's services resulted in benefit to the defendant, that he was liable to pay without either precedent request expressed or implied, or subsequent promise.

It is unnecessary to consider the remaining assignment of error that the court erred in allowing the damages in the declaration to be increased after verdict.

Judgment reversed, and a *venire facias de novo* awarded.[1]

VINTON v. BALDWIN.

1882. Supreme Court of Indiana. 88 Ind. 104.

Elliott, J.—On the 5th day of June, 1879, the appellee executed a written agreement appointing appellant his agent to procure a loan, and promising to pay him "for his services five per cent. commission on the amount of the loan obtained." Formal application was made for a loan; the parties to whom it was made agreed to lend the money applied for; the appellant notified appellee that his proposition for a loan had been accepted, and gave him a form of mortgage to execute; the paper was taken by the appellee, who promised to cause it to be duly signed and acknowledged; the day following the appellant notified the appellee that he had the money ready for him, but the latter refused to accept it, and declined to take the loan. The facts are not in dispute, and the only question is whether the court correctly applied the law to them. We are clear that the court erred.

A broker who is employed to procure a loan is entitled to his commission when he procures a lender ready, willing and able to lend the money upon the terms proposed. His right to commission does not depend upon the contingency of the applicant's acceptance of the loan, but upon his performance of his part of the contract. The principal cannot deprive the broker of his commission by refusing to accept the loan which the negotiations of the latter have resulted in securing. In Green v. Lucas, 33 L. T. (N. S.) 584, Lord Cairns said, in a case very similar to the present: "It appears to me that the plaintiff had done everything which agents in this kind of work were bound to do, and it would be forcing their liability if they were

[1] The agent's right to compensation may arise from an implied contract. See Garrey v. Stadler, 67 Wis. 512.

Regarding the right of one member of a family to recover from another for services, see Hill v. Hill, 121 Ind. 255.

[illegible] the plaintiff dropped the name of [illegible] from the pre-[illegible] and no longer [illegible] himself as [illegible] counsel. Yet the learned judge left it to the jury [illegible] that the plaintiff's services resulted in benefit to the defendant [illegible] was liable to pay without either [illegible] express [illegible] or subsequent promise.

It is unnecessary to [illegible] the [illegible] judgment of error that the court [illegible] the damages in the declaration to be increased after verdict.

Judgment [illegible] [illegible] costs.

[illegible] v. BALDWIN.

1881. [illegible] COURT OF APPEAL. No. 101.

[illegible] of June, 1879, the appellant executed a written [illegible] appellant has agreed to procure a [illegible] at the annual rent [illegible] for the first [illegible] years." Formal application was made and [illegible] to which it was made agreed to [illegible] The appellant notified appellee that his [illegible] accepted, and gave him a form of [illegible] The paper was taken by the appellee, who promised [illegible] agreement was acknowledged; the day following [illegible] the appellee [illegible] to [illegible] the money ready for him [illegible] account, but declined to take the loan. [illegible] in dispute, and the only question is whether the [illegible] applied for [illegible] to him. We are clear that the [illegible]

A broker [illegible] procure a loan is entitled to his commission when he [illegible] ready, willing and able to lend the money upon the [illegible] security. His right to commission does not depend upon the [illegible] of the borrower's acceptance of the loan, but upon his [illegible] of his part of the contract. The principal cannot deprive the [illegible] of his commission by refusing to accept the loan [illegible] the negotiations of the latter have resulted in securing it. In Green v. [illegible], 3 L. T. (N. S.) 584, Lord Cairns said, in a case very [illegible] to the present: "It appears to me that the plaintiff had done [illegible] agent in this kind of work were bound to do, and to enable [illegible] their liability if they were

[illegible]

to be held answerable for what happened after. If the contracts afterwards were to go off from the caprice of the lender, or from the infirmity in the title, it would be immaterial to the plaintiffs." Green v. Reed, 3 F. & F. 226; Green v. Lucas, 31 L. T. (N. S.) 731. In principle the case of a broker negotiating a loan is the same as that of a broker negotiating a sale of property, and in the latter case it is uniformly held that the commissions are earned when a purchaser is found able and willing to buy on the terms proposed. In such cases the broker's right to compensation is held to accrue when he has furnished a purchaser, and does not depend upon the ultimate consummation of the sale. Lane v. Albright, 49 Ind. 275; Love v. Miller, 53 Ind. 294 (21 Am. 192); Reyman v. Mosher, 71 Ind. 596; Moses v. Bierling, 31 N. Y. 462; 24 Alb. Law J. 536; Mooney v. Elder, 56 N. Y. 238; Hart v. Hoffman, 44 How. Pr. 168; Prickett v. Badger, 1 C. B. (N. S.) 296.

A real estate or loan broker may recover commissions, although he acts for both parties; but it must appear that he acted openly and fairly, and that all the facts were known to both principals. A broker is regarded as a middleman, and not as an agent in whom peculiar trust and confidence are placed. Alexander v. Northwestern, etc., University, 57 Ind. 466; Rowe v. Stevens, 53 N. Y. 621; Rupp v. Sampson, 16 Gray 398; Redfield v. Tegg, 38 N. Y. 212; Barry v. Schmidt, 27 Alb. L. J. 297.

We have had no brief from the appellee, and our unaided efforts have not furnished us with any reason upon which the finding can be sustained.

Judgment reversed.[1]

(b) WHEN AGENCY IS TERMINATED BEFORE EXPIRATION OF SPECIFIED TERM.

HUNT, ADMR., ET AL. v. CRANE.

1857. HIGH COURT OF ERRORS AND APPEALS OF MISSISSIPPI.
33 Miss. 669.

HANDY, J.—This action was brought by the defendant in error to recover for the breach of a contract for work and labor, made by him with the plaintiffs in error for a specified term, the performance

[1] "It is well settled, that a factor may retain the goods or the proceeds of them, not only for the charges incident to that particular cargo, but for the balance of his general account; and this allowance is made not only while the goods remain in specie, but after they are converted into money." Kent, Ch., in Bradford v. Kimberly, 3 Johns. Ch. (N. Y.) 431, 434.

of which he entered upon but was prevented, by the conduct of the plaintiffs in error, from completing. The declaration alleges that after he had undertaken the work, and was willing to complete his term according to the contract, he was told by the plaintiffs in error that if he continued in their service it must be at wages greatly below the price stipulated in their contract; and in consequence of that refusal by them to comply with the terms of the contract, he was thrown out of employment, and after losing considerable time in ineffectually seeking other employment, he was then employed by another person at greatly reduced wages.

A verdict and judgment was rendered for the plaintiff below.

The first ground of error taken in behalf of the plaintiffs is that the declaration is not sufficient to support the verdict. The objection is, that the declaration merely alleges that the defendant in error was "willing to work in accordance with his agreement," etc., and does not allege that he offered to do so. But it is averred that in consequence of the refusal of the plaintiffs in error to comply with the agreement, he was thrown out of employment. This refusal consisted in the notice given to him that if he remained longer in their service it must be at greatly reduced wages; and it cannot be understood otherwise than as a notice that his engagement at the price agreed upon was discontinued, and that he was thrown out of employment. This is sufficient, especially after verdict.

Again, it is objected that the court erred in refusing the instruction asked in behalf of the plaintiffs in error, "that the jury could only find for the plaintiff such damages as he actually sustained."

As an abstract proposition, this instruction was unobjectionable. But it did not fully state the rule by which the jury were to be governed in assessing damages, with reference to the facts of the case before them. This was already stated to them in a clear and practical manner by the instruction granted at the instance of the plaintiff, that the measure of damages was the injury that the plaintiff had sustained, and that in estimating the damages they should find the sum stated in the contract, less the value of the plaintiff's services during the residue of the year, as proved, provided those wages were all or the best he could obtain. The rule here declared was plain and explicit, and readily enabled the jury to ascertain the amount of injury sustained; whereas that asked by the plaintiffs in error was uncertain, and susceptible of misapplication. It was unnecessary, and was therefore properly refused.

Another objection is taken to the instruction that the burden of proof was on the defendants to show that the plaintiff could have obtained higher wages than he did obtain, and that it was sufficient for the plaintiff to show, or that it appeared in evidence, that he went to work after his discharge. We think that this rule was properly stated, under the circumstances of this case.

The principle applicable to such cases is, that the employer is lia-

[illegible]

GOODRICH v. WORDSWORTH.

1860. *Supreme Court of New York. 32 Barb. 381.*

Action brought to recover wages under a contract to work for the plaintiff for three years, from August 1st, 1857, payable quarterly, and damages for a breach of the contract by the defendant, in discharging the plaintiff from his employment on the 26th December, 1857, without cause. The defendant pleaded and proved that in January, 1858, after the plaintiff had declared, he commenced an action in this court against the defendant, and in his complaint claimed one quarter's wages, and damages for the wrongful discharge on the 26th of December, and [illegible] the plaintiff recovered. That issue was joined and the cause noticed, and the evidence reported in favor of the plaintiff for one quarter's wages [illegible] value of his last time and [illegible] and that the second quarter of the contract was running without [illegible] commenced, or it was entered [illegible] the plaintiff [illegible] this action.' The plaintiff [illegible] on the trial in this case, [illegible] plaintiff had been ready to perform [illegible] since his discharge and [illegible] ground that the former action [illegible] plaintiff's counsel excepted, [illegible] tions be heard at the general [illegible]

JOHNSON, *J.*—The only question [illegible] former action, brought to the [illegible]

[illegible]

[illegible] which he entered upon and was prevented [illegible] the conduct of the plaintiffs in error, from completing. The [illegible] alleges that after he had undertaken the work and was willing to complete his term according to the contract, he was told by the plaintiffs in error that if he continued in their service it must be at a wages greatly below the price stipulated in the contract; that in consequence of that refusal by them to employ him, he left the service of the contractor, he was thrown out of employment, and after losing considerable time in ineffectually seeking other employment, he was then employed by another person at greatly reduced wages.

A verdict and judgment was rendered for the plaintiff below.

The first ground of error relied on by the plaintiffs is that the declaration is not sufficient to support the verdict. The objection is that the declaration merely alleges that the defendant in error was willing [illegible] in accordance with the agreement," etc., and does not allege that he offered to do so. But it is averred that in consequence of the refusal of the plaintiffs in error to comply with the [illegible] he left their employment. This refusal constituted a [illegible] him that it is unnecessary longer to make [illegible] of greatly reduced wages; and it cannot be [illegible] that it is a valid objection that the declaration [illegible] that he was thrown out of employment especially after verdict.

[illegible] the court erred in refusing the instruction asked by the plaintiffs in error, "that the jury could only find for the plaintiff such damages as he actually sustained."

[illegible] this instruction was unobjectionable. But it did not fully state the rule by which the jury were to be governed in assessing damages with reference to the facts of the case before them. [illegible] stated by [illegible] in a clear and practical manner by the instruction granted at the instance of the plaintiff, that the measure of damages was not merely that the plaintiff had sustained [illegible] but whether they should find the sum stated in the declaration was the value of the plaintiff's services during the [illegible] as proved, [illegible] time wages were all of the [illegible] consideration. The rule [illegible] was plain and explicit, and [illegible] enabled the jury to ascertain the amount of injury [illegible] from that asked by the plaintiffs in error was uncertain [illegible] of misapplication. It was unnecessary, and was therefore properly refused.

Another objection [illegible] instruction that the burden of proof was on the defendant to show that the plaintiff could have obtained higher wages was not correct, and that it was sufficient for the plaintiff to show, or rely upon in evidence, that he went to work after his discharge. We think that this rule was properly stated, under the circumstances of the case.

The principle applicable [illegible] is that the employee is lia-

ble to the employee for such damags as the latter may sustain, after due diligence to obtain other and the best wages he can in some proper business. Where he fails to obtain employment, it is necessary that he should show that he was unable to do so after due diligence, in order to be entitled to recover for the time he was out of employment. This was the case in Prichard v. Martin, 27 Miss. 306. But where he obtains employment, the presumption is that he gets the best wages he can; because the strong inducement of self-interest would impel him to do so, and the idea is most unreasonable that he did not act accordingly. Hence that presumption must prevail, unless it be shown by the adverse party, or otherwise appears, that he accepted less wages than he could have obtained. * * *

Judgment reversed.[1]

COLBURN v. WOODWORTH.

1860. Supreme Court of New York. 31 Barb. 381.

Action brought to recover wages, under a contract to work for the plaintiff for three years, from August 1st, 1857, payable quarterly, and damages for a breach of the contract by the defendant, in discharging the plaintiff from his employment, on the 26th December, 1857, without cause. The defendant pleaded and proved that in January, 1858, after the plaintiff was discharged, he commenced an action in this court against the defendant, and in his complaint claimed one quarter's wages, and damages for the wrongful discharge on the 26th of December, set forth in the present complaint. That issue was joined and the cause referred, and the referee reported in favor of the plaintiff, for one quarter's wages (less the value of his lost time and payments made to him), and "that the second quarter of the contract not having expired when the suit was commenced, he is not entitled to recover for the payment of that in this action." The plaintiff had judgment on the report. The court, on the trial in this case, rejected evidence offered to show that the plaintiff had been ready to perform, and had been out of employment since his discharge, and granted a motion for a non-suit, on the ground that the former action was a bar to the present claim. The plaintiff's counsel excepted, and the court ordered that the exceptions be heard at the general term.

Johnson, J.—The only question here presented is, whether the former action, brought by the plaintiff, to recover damages against

[1] The judgment was reversed on the ground that a deposition *de bene esse* was improperly admitted. The portion of the opinion dealing with this point is omitted.

the defendant for a breach of the same contract, is a bar to this action. The plaintiff, in the former action counted upon a breach of the contract by the defendant, in discharging him from further work and labor, under the contract, and refusing to allow him to work any longer under the same, and claimed damages by reason of such breach, and for loss of employment and inability to obtain other employment on terms as favorable as he had secured by the agreement.

The plaintiff in this action avers the same identical breach, and the right of action is predicated entirely upon it. It is true that in addition to his other damages he now claims for wages according to the contract, for the three-quarters of the year ending on the 1st of August, 1858. But this is not for services rendered under the agreement, but the claim for compensation is founded upon the alleged offer and readiness of the plaintiff to work according to the agreement, and the defendant's refusal to allow him to do so. This, however, makes no difference in the nature of the action. It is still founded upon the breach of the contract by the defendant, and not upon its performance by the plaintiff. It is entirely clear that the two causes of action are identical, however the measure of damages claimed may be varied. On the former trial the referee, as it appears, found as matter of fact that the defendant had wrongfully put an end to the contract as alleged in the complaint, without any fault on the part of the plaintiff, but held, nevertheless, as matter of law, that the plaintiff was not entitled to damages for such breach, but must wait until another payment became due by the terms of the agreement, before he could maintain an action for such cause. In this the referee was clearly mistaken. A party discharged under such circumstances has three remedies, either of which he may pursue at his election. First, he may bring a special action to recover the damages arising from such breach; and this remedy he may pursue the moment the contract is broken. Secondly, he may treat the contract as rescinded, and immediately sue on the *quantum meruit* for the work actually performed. Or, thirdly, he may wait until the termination of the period for which he was hired, and claim as damages the wages agreed to be paid by the contract. (See 2 Smith's Lead. Cases p. 27, notes to Cutter v. Powell.) It is manifest, however, that a party under such circumstances could not pursue all these remedies in separate actions. An action upon one, and judgment upon it, would operate as a bar to any further action. This necessarily results from the doctrine that a party cannot split up a demand, and maintain several actions for the same cause. (Fish v. Folley, 6 Hill 54; Bendemagle v. Cocks, 19 Wend. 207.)

It is claimed on the part of the plaintiff that the referee in the former action, having decided that no action could be maintained for the cause alleged, and judgment having been entered upon his report in accordance with such decision, it cannot operate as a bar to this action. But the rule is otherwise. If the party submits his

claim to be passed upon, it will operate as a bar, if the decision is erroneous, the same as though it were not, if his cause of action has then accrued. The error must be corrected in that action by review of the verdict or judgment, and not by a new action for the same cause. (Brockway v. Kinney, 2 John. 210; Platner v. Best, 11 *id.* 530; Phillips v. Berick, 16 *id.* 136; Cowen & Hill's Notes, 842, 3, 956, 7.)

There can be no doubt that the cause of action here alleged is in its nature indivisible. All the damages which the plaintiff could under any circumstances recover were such as flowed directly and necessarily from the breach, which is the sole cause of action. The contract is not in the nature of a continuing covenant, like a covenant running with land. It is idle to suppose that when such a contract has been once put an end to by one party entirely, though without sufficient cause, and the other party has brought his action for the damages occasioned by such breach, and had the judgment of the court upon his claim, the contract still remains in force, so as to entitle such other party to the compensation provided for in case of its performance. When the action is brought to recover damages for a breach of that character, it is necessarily an election, on the part of the party prosecuting it, to consider the contract at an end, so far at least as performance on his part is concerned. The action operates as a rescission by him as to further performance. If the party thus situate brings his action before the entire measure of damages has been filled, or before the damages have all become known, so as to be susceptible of proof, it is his folly, or misfortune. He cannot sever them, and recover part in one action and the residue, when discovered, in another. But the question as to what damages the plaintiff ought to recover as his compensation does not arise here. That question necessarily arose in the other action, and should have been there determined. That action being a bar, the non-suit was properly granted.

New trial denied.[1]

COSTIGAN v. MOHAWK & HUDSON R. R. CO.

1846. Supreme Court of New York. 2 Den. 609.

Motion on part of the plaintiff to set aside the report of a sole referee. The action was assumpsit on a contract by which the defendants agreed to employ the plaintiff to serve them as superintendent of their railroad.

[1] *Accord:* Richardson v. Eagle Machine Works, 78 Ind. 422. Compare Armfield v. Nash, 31 Miss. 361.

The case proved was as follows: The defendants employed the plaintiff to superintend their railroad for one year, from May 1, 1843 —at a salary of $1,500 for the year, together with the use of a dwelling house worth $150 per annum. He commenced the service and continued in the employment until July 1st of that year, when he was dismissed by them without cause. Upon this he gave them notice that he was ready to proceed and perform his contract, and that he should claim his salary for the entire year, according to the agreement. He was not, however allowed to go on with the business, and remained wholly unoccupied for the residue of the year, although at all times ready to serve according to his contract.

The referee reported $402.93 to be due the plaintiff; which was arrived at by allowing him $625 on account of salary, and $62.50 for being deprived of the house, and deducting $284.59 which had been paid. He was of opinion that three months was a reasonable time for the plaintiff to find other employment, and accordingly allowed him the amount which would have been due for five months' services.

Beardsley, J.—As a general principle, nothing is better settled than that upon these facts the plaintiff is entitled to recover full pay for the entire year. He was ready during the whole time to perform his agreement, and was in no respect in fault. The contract was in full force in favor of the plaintiff, although it had been broken by the defendants. In general, in such cases, the plaintiff has a right to full pay. The rule has been applied to contracts for the hire of clerks, agents, and laborers, for a year or a shorter time, as also to the hire of domestic servants, where the contract may usually be determined by a month's notice, or on payment of a month's wages. The authorities are full and decisive upon this subject: Chit. Con., 5th Am. ed., 575-581; 1 Chit. Gen. Pr. 72-83; Browne on Actions at Law 181-185, 504, 505; Besston v. Collyer, 4 Bing. 309; Fawcett v. Cash. 5 Barn. & Adol. 904; Williams v. Byrne, 7 Ad. & El. 177; French v. Brookes, 6 Bing. 354; Gandell v. Pontigny, 4 Camp. 375; Robinson v. Hindman, 3 Esp. 235; Smith v. Kingsford, 3 Scott 279; Smith v. Hayward, 7 Ad. & El. 544. In no case which I have been able to find, and we were referred to none of that character, has it ever been held or even urged by counsel, that the amount agreed to be paid should be reduced, upon the supposition that the person dismissed might have found other employment for the whole or some part of the unexpired term during which he had engaged to serve the defendant. And yet this objection might be taken in every such case, and in most of them the presumption would be much more forcible than in the case at bar. The entire novelty of such a defense affords a very strong if not a decisive argument against its solidity: Duke of Newcastle v. Clark, 8 Taunt. 602. Nor do I find any case in which it was proved that other employment was offered to the plaintiff after his dismissal, and that his recovery was defeated or

diminished because he refused to accept of such proffered employment.

It has, however, been held, and rightly so, as I think, that where a seaman hired for the outward and return voyage, was improperly dismissed by the captain before the service was completed, a recovery of wages by the seaman for the whole time, was proper, deducting what he had otherwise received for his services after his dismissal and during the time for which his employer was bound to make payment: Ab. Sh., 4th Am. ed., 442, 443; Hoyt v. Wildfire, 3 Johns. 518; Ward v. Ames, 9 *id.* 138; Emerson v. Howland, 1 Mason 51, 52.

And upon the same principle, where a merchant engaged to furnish a given quantity of freight for a ship, for a particular voyage, and fails to do so, he must pay dead freight, to the amount so agreed by him, deducting whatever may have been received from other persons, for freight taken in lieu of that which the merchant had stipulated to furnish: Abbott 277, 278; Puller v. Staniforth, 11 East 232; Puller v. Halliday, 12 *id.* 494; Kleine v. Catara, 2 Gall. 66, 73. Upon this principle, as I understand, the case of Shannon v. Comstock, 21 Wend. 457 (34 Am. Dec. 262), was decided. The defendants there engaged to pay the plaintiffs fifty-five dollars for the transportation of a certain number of horses, on the canal, from Whitehall to Albany, but failed to comply with their agreement. An action was thereupon brought to recover the fifty-five dollars, and the contract and its violation having been shown, "the defendants offered to prove that the damages sustained by the plaintiffs did not exceed five dollars." What facts were offered to be given in evidence in order to establish this result, cannot be collected with absolute certainty, from the report of the case, but it does not appear that any objection was made to the form of the offer, and the report shows that the evidence was objected to and excluded. I infer then, that the offer of the defendants was to show, by competent evidence, that the plaintiffs took other freight on board their boat instead of the horses, so that their loss, by the violation of this contract, was but small. Upon the ground already stated, that loss was the amount the plaintiffs were in law and justice entitled to recover. So this court held, and as the evidence had been rejected in the court below, the judgment was reversed. The views of the chancellor, as stated in the case of Taylor v. Read, 4 Paige 571, are to the same effect, and the propriety of the rule seems to me too apparent to admit of doubt.

In these cases it appeared, or was offered to be shown, that the plaintiffs had in fact performed services for others, and for which they had been paid, in lieu of those they had bound themselves to perform for the defendants, and which the latter had refused to receive. In Heckscher v. McCrea, 24 Wend. 304, the court went a step further. That case arose in the superior court of the city of

New York, where McCrea was plaintiff. It was an action for dead freight which the plaintiff claimed under a special contract with the defendants. They had agreed with the plaintiff to furnish a given number of tons of freight, at a certain price, for a return cargo from China to New York in the plaintiff's ship. A part of the freight was furnished by the defendants, as agreed, but they fell short about one hundred and thirty tons. The agents for the defendants at Canton, where the ship then was, having no more freight to put on board for the defendants, offered to supply the deficiency, from the goods of other persons in their hands, which the agents were authorized to ship to the United States: such shipment to be made at a reduced, although at the then current rate, but with an express agreement that receiving this freight on such reduced terms should not interfere with the original arrangement between the parties to this suit. This offer was declined, and to the extent of this deficiency the ship came home empty. The action was to recover for this deficient freight. The court held that the plaintiff should have taken the freight offered, although at a rate below what the defendants had agreed to pay: that so far it would have relieved the defendants without doing injury to the plaintiff, and by which about two-thirds of the amount now claimed might have been saved.

In all the cases I have cited, the facts on which the delinquent party sought to bring the amount to be recovered, below the sum agreed to be paid, were proved or offered to be proved on the trial. Nothing was left to inference or presumption, and it was virtually conceded that the *onus* of the defense rested on the defendant. They are also cases in which the plaintiffs had either earned and received money from others, during the time when they must have been employed in fulfilling their contract with the defendants, or in which they might have earned it in a business of the same character and description with that which they had engaged with the defendants to perform.

The principles established by the cases referred to seem to me just, and although I have found no case in which they have been applied to such an engagement as that between these parties, still I should have no hesitation, where the facts would allow it to be done, to apply them to such a case as this.

But first of all the defense set up should be proved by the one who sets it up. He seeks to be benefited by a particular matter of fact, and he should therefore prove the matter alleged by him. The rule requires him to prove an affirmative fact, whereas the opposite rule would call upon the plaintiff to prove a negative, and therefore the proof should come from the defendant. He is the wrong-doer, and presumptions between him and the person wronged should be made in favor of the latter. For this reason therefore the *onus* must in all such cases be upon the defendant.

Had it been shown, in the case at bar, that the plaintiff, after his

dismissal had engaged in other business, that might very well have reduced the amount which the defendants otherwise ought to pay. For this the cases I have referred to would furnish sufficient authority. But here, it appears that the plaintiff was not occupied during any part of the time from the period of dismissal to the close of the year.

Again, had it been shown on the trial, that employment of the same general nature and description with that which the contract between these parties contemplated, had been offered to the plaintiff, and had been refused by him, that might have furnished a ground for reducing the recovery below the stipulated amount. It should have been business of the same character and description, and to be carried on in the same region. The defendants had agreed to employ the plaintiff in superintending a railroad from Albany to Schenectady, and they cannot insist that he should, in order to relieve their pockets, take up the business of a farmer or a merchant. Nor could they require him to leave his home and place of residence, to engage in business of the same character with that in which he had been employed by the defendants.

I think we cannot, as between these parties, presume that the plaintiff might have been so employed and that he refused; and therefore the report, in my judgment, should be set aside. If the defendants can prove that such employment was offered, it may reduce the amount otherwise recoverable; but if such proof shall not be given, the report, I think, should be for the salary at one thousand five hundred dollars a year, and rent at one hundred and fifty dollars, and for a full year, deducting the amount which may have been paid toward the same.

Report set aside.[1]

COOPER, J., IN TIMBERLAKE v. THAYER.

1893. SUPREME COURT OF MISSISSIPPI. 71 Miss. 279.

IF we were authorized to make the law, instead of announcing it as it is already made, we would unhesitatingly hold that one contracting to render personal service to another for a specified time, could, upon breach of the contract by himself, recover from that

[1] If the agent, after his discharge, has engaged in other employment, the original employer, when sued for breach of his agreement, is entitled to have deducted from the damages whatever the agent received from the subsequent employment. Williams v. Anderson, 9 Minn. 50; Sutherland v. Wyer, 67 Me. 64.

It is the duty of the employee, when wrongfully discharged, to seek other employment of similar kind. Williams v. Chicago Coal Co., 60 Ill. 149.

See Strauss v. Meertief, 64 Ala. 299.

other for the value of the service rendered by him and received by that other, subject to a diminution of his demand to the extent of the damage flowing from his breach of contract. In Britton v. Turner, 6 N. H. 481, Judge Parker demonstrates, in an admirable and powerful opinion, the equity of such a rule; and it was held in that case that such was the rule of the common law. The courts of some of the states have followed or been influenced by that opinion, and have overturned or mitigated the rigorous rule of the common law. Pixler v. Nicholas, 8 Iowa 106 (74 Am. Dec. 298); Coe v. Smith, 4 Ind. 79 (58 Am. Dec. 618); Riggs v. Howe, 25 Tex. Supp. 456 (78 Am. Dec. 584); Chamblee v. Baker, 95 N. C. 98; Purcell v. McComber, 11 Neb. 209. But the decided weight of authority is to the contrary. Lawson on Contracts, § 470, n. 4, and authorities there cited. And it was decided at an early day in this state that an entire contract of this character could not be apportioned, and that under the circumstances named no recovery could be had by the party guilty of the breach of contract; that he could not recover on the special contract because he himself had not performed it, nor upon *quantum meruit,* because of the existence of the special contract. Wooten v. Read, 2 Smed. & M. 585. In Hariston v. Sale, 6 Smed. & M. 634, and Robinson v. Sanders, 24 Miss. 391, it was held that an overseer's contract with his employer, though made for a definite time, was not an entire contract, and recoveries were allowed on the common counts.

The cases relied on to support the rule announced in these decisions were Byrd v. Boyd, 2 McCord (So. Car.) 246; Eaken v. Harrison, *id.* 249; McClure v. Pyatt, *id.* 26. Of these, the leading cases is Byrd v. Boyd; the others simply follow it. In Byrd v. Boyd, the court evidently legislates the exception into the law, and so, in effect, declared, for, after referring to the rule of the common law, the court proceeds to say: "There is, however, a third class of cases for which it is necessary to provide," and then declares that these cases for which it is necessary for the court "to provide" are "those where the employer reaps the full benefit of the services which have been rendered, but some circumstance occurs which renders his discharging the *overseer* necessary and justifiable, and that, perhaps, not immediately connected with the contract, as in the present case."

The South Carolina court put its decision expressly upon the ground of expediency, and confined its effect, by necessary implication, to the particular sort of contract under consideration. Since the abolition of slavery we have no such contracts, *stricte,* as those which formerly existed between employer and overseer, and the decisions in Wooten v. Reed, and Hamilton v. Sale have no field of operation. The instructions for the plaintiff were properly given.[1]

[1] See Davis v. Maxwell, 12 Met. (Mass.) 286.

DIEFENBACK v. STARK.

1883. Supreme Court of Wisconsin. 56 Wis. 463.

The defendant appealed from a judgment in favor of plaintiff.

Orton, J.—The first count of the complaint is for four months' labor of plaintiff's son, for which the defendant promised to pay $16 per month; and the second count is for four months' labor of the son, which was reasonably worth $16 per month. The answer sets up a special contract by which the plaintiff's son was to work for the defendant six months, at $16 per month, to be paid at the expiration of the six months, and avers the non-performance of the contract by the plaintiff. It appears from the testimony of the plaintiff and the son that the contract was that the son was to work on the farm of the defendant six months from April 1, for $16 per month, and for the purposes of the case in this court, this must be accepted as the contract, and the whole of it. The defendant and another witness present testified to the contract as stated in the answer. It was also proved that the son worked under this contract for four months only, and then left the service of the defendant solely on the ground that the defendant refused to pay him for such four months, or from month to month. There was evidence offered for the defendant of special damages by reason of the non-fulfilment of the contract on the part of plaintiff; but as in our view, the instructions asked, which negatived the right of the plaintiff to recover under the evidence on account of his non-performance of the contract, ought to have been given, other questions raised by the exceptions need not be considered. The county court refused to instruct the jury as requested by the defendant's counsel, as follows: 1. That the contract (as stated by the plaintiff and his son) was an entire contract; 2, that from the evidence in the case, the money due on the contract in question was payable the 1st day of October; 3, that the action was prematurely brought; 4, that the plaintiff was not entitled to recover; 5, that if you find the plaintiff's boy left of his own accord, without fault of the defendant, the plaintiff cannot recover; 6, that the fact that the defendant did not pay plaintiff's boy money when asked for, was not sufficient reason for the boy to leave.

The point of these requests to instruct the jury was substantially, that the plaintiff could not recover in this action on the contract, or upon the common count for work and labor, without showing full performance of the contract on his part by the labor of the son for the defendant for the whole six months, unless excused by the act of God or the fault of the defendant, or that the money on the contract was due only at the expiration of that time, upon such performance; or in other words, that this contract was an entirety, and neither party could recover of the other without full performance

on his part, or legal excuse for non-performance. The county court committed, in our opinion, the double error of refusing to give these instructions, and submitting to the jury the question whether the contract was an entire one, or whether the money was due monthly or at the end of the six months. It was the duty of the court to construe this contract, as testified to by the plaintiff himself, and not leave such a question to the jury. Ranney v. Higby, 5 Wis. 62; Mowry v. Wood, 12 *id.* 413; Martineau v. Steele, 14 *id.* 272; and numerous other cases which might be cited to swell this opinion, but which need not be, because the decisions are all one way on the question. The contract, according to the testimony of the plaintiff, was an entirety, and no recovery could be had without proof of full performance, or performance excused, and the compensation was to be paid only at the end of the six months, on full performance by the plaintiff, and the court should have so instructed the jury, or have given the instructions asked by the defendant, which imported the same thing, and this presents the real question in the case upon this appeal; for the plaintiff, on this evidence and the instructions, obtained a verdict in his favor at the rate of $16 per month for four months, and obtained judgment therefor.

From some general language in the text-books, as well as in some opinions in cases of other contracts, it would seem as if this question in respect to contracts for mere work and labor, or for mere personal service, was in conflict. But we have the authority of so able and eminent a jurist as Judge Parsons for saying that there is really but one case, and that is the one cited in the brief of the learned counsel for the respondent, in which it is held that on a contract for services merely, a recovery can be had upon a *quantum meruit* for the value of the service already rendered under such a contract, without a full performance. That case is the noted one of Britton v. Turner, 6 N. H. 481; 26 Am. Dec. 713. But it seems there were other cases in the same state, and in at least one other state, before that text was written, and there have been cases since in Iowa, and perhaps in some other states, to the same effect. It is safe to say, however, that they are against the current of authority in this country and in England, and certainly against reason. To allow suit in such cases upon a *quantum meruit,* without full performance and recoupment of damages, would in most cases be quite inadequate to indemnify the employer under the ordinary rule of such damages.

The distinction between such a contract and building contracts, and some others, in which this equitable doctrine has been applied, is very clear and distinct and rests upon at least plausible reasons. In respect to the latter contracts it is said in 1 Story on Cont., § 27: "If, however, a party acting honestly, and with *bona fide* intention of fulfilling the contract, performs it substantially, but fails in some comparatively slight particular, he is entitled to a fair compensa-

tion according to the contract, the other party receiving credit for whatever loss or damage he may have sustained by these deviations." Even beyond this rule, there are other cases, which fall within the class of building contracts, the doctrine of which is as well stated by this court in Taylor v. Williams, 6 Wis. 363, as in any other cases or in any text-books, where the contract was for the construction of a building in a certain manner, and in a certain time, and where the employer accepted and used the building, and thereby virtually admitted that it was some benefit to him, and that the builder was entitled to some compensation therefor, he was allowed to recover a *quantum meruit,* notwithstanding he had not completed the work fully according to the contract. Without further specifying contracts which fall within this principle, it is sufficient to state the reasons for the distinction between them and a contract for hiring services, or for work and labor simply.

The criterion is as well stated by the same author (1 Story on Cont., § 33): "Wherever the failure as to part would materially defeat the objects of the contract, and would have affected (it), had such failure been anticipated, the contract would be entire." There is perhaps, a better and more certain criterion affecting all such contracts stated in 2 Pars. on Cont., § 522, and that is the possibility or impossibility of a certain apportionment of benefits, according to the compensation in the contract, in case of part performance only; or as stated by the author: "We have seen that where parties make a contract which is not apportionable, no part of the consideration can be recovered in an action on the contract until the whole of that for which the consideration was to be paid is performed." In the subsequent section the rule stated may be broad enough to embrace all contracts, and especially contracts for service, or work and labor, and the casual reader may be misled by it. The language is: "If one party, without the fault of the other, fails to perform his side of the contract, in such a manner as to enable him to sue upon it, still if the other party have derived a benefit from the part performance, it would be unjust to allow him to retain that without paying anything." But in addition to the criterion laid down in the previous section, it is said in the note which contains a very able review of the authorities, and citation of many authorities to sustain the position, that contracts for service are not embraced within the rule laid down in the text. "We are not aware that there are any cases upon contracts for service fully sustaining the proposition in the text, except the celebrated one of Britton v. Turner, 6 N. H. 481. After quoting largely from the opinion in that case, the note proceeds to say: "But the courts of other states have thus far shown little disposition to adopt the views of the learned judge. Thus in Eldridge v. Rowe, 2 Gilm. 91, the court held upon a similar state of facts, that the plaintiff was not entitled to recover."

"An entire contract is one, the consideration of which is entire on

both sides. The entire fulfilment of the promise by either, in the absence of any agreement to the contrary or waiver, is a condition precedent to the fulfilment of any part of the promise by the other." "The principle upon which this rule is founded seems to be that as the contract is founded upon a consideration dependent upon the entire performance thereof, if from any cause it be not wholly performed, the *casus fœderis* does not arise, and the law will not make provision for exigencies against which the parties have neglected to fortify themselves." 1 Story on Cont., § 26. This text is made by the author applicable to contracts for service, and in a note are cited numerous authorities—too numerous to be repeated here—to sustain it. The text proceeds to say: "If a party agree to work for a year for the certain sum of $120, and before the expiration of the year abandon such agreement without the consent of the other party, he cannot recover upon a *quantum meruit.*" Stark v. Parker, 2 Pick. 267; 13 Am. Dec. 425, and many other authorities are cited to the same proposition. We can well see how a contract for service such as the one in question ought not and cannot fall within that class of contracts, upon the part performance of which a recovery of a *quantum meruit* may be allowed by the criterions above stated. In such a contract, when the rate of payment is stated by the month, the time of service fixed by it would be entirely nugatory, if not essential to a recovery of anything unless there has been full performance, and I think we may well say that the time of service is, if not the whole, a very important and essential part of the consideration of the promise to pay. Such a contract is not an apportionable one, because the several months' service may and are quite likely to be of very different benefit and value. We may well say that if the defendant here understood that he was hiring the plaintiff's boy from month to month or for only one month, at the option of the plaintiff, there would have been no stipulation that he should work six months and the wages would have been less. It follows that the whole time is the consideration of the promise to pay, and the benefits and value for one month or for four months cannot be exactly apportioned.

The entirety of such a contract was virtually decided by this court in Jennings v. Lyon, 39 Wis. 553; s. c. 20 Am. 57, where the contract was for one year and abandoned before the time, and suit was brought for the value of the services already rendered. The present chief justice said in his opinion: "The general rule doubtless is, that where a contract is entire, operating as a condition precedent, it is necessary for a party to show full performance on his part before he can maintain an action upon it." In that case the only exceptions to this rule in such cases which could be recognized were stated to be where full performance is prevented by the act of God or the conduct of the other party, and it was held that the plaintiff could not recover because he had not fully performed and was not pre-

employ from so doing by a sickness which he could not have anticipated at the time of the making of the contract. The recent case of Fox v. Horne, 51 Wis. 541, 8 N. W. 392, 37 Am. Rep. 839, is not in conflict with these views of this decision. In that case the entirety of the contract was not in question nor considered, and the only question was whether the defendant had not received the right to take advantage of its entirety by receiving work with his employment the plaintiff after he had lost during the year several days by sickness. It is said incidentally in the opinion in that case that holdings such an opinion "is not going as far as the opinion of the court in Britton v. Turner," and that this case had been followed in many cases, and there the opinion says, and I think incorrectly, that "there are many equitable reasons to sustain the decision of the above cases." The entirety of the contract is the only question in this case.

This is perhaps more than sufficient as to the general rule of severable contracts, when the time of service is fixed; and it only remains to inquire whether the sum of compensation being fixed by the month will take this case out of the general rule and make the contract a divisible instead of an entire one, and allow a recovery from month to month, and for time possible as in this case, when the time of service is fixed at six months. Without authorities upon this exact question, it seems reasonable that the month is only mentioned in connection with the compensation to determine the rate of the whole amount. If otherwise, and this mention of the month determines the time for which the plaintiff is bound to service, then the mention of the "six months" only was useless, and this part of the contract is not only ambiguous in the other but superfluous. But authorities to point are not wanting. In Laney v. Young, 8 Cow. 63, the contract was to work "by the day at ten dollars per month." The plaintiff worked one month and a half and then left without cause. It was held that he could recover [illegible] placed against him on the contract. In Hodges v. Hodges, 1 Dev. 54, the contract was to work for a year at $7 per month. The plaintiff left the defendant's employment at the end of seven months and sued for his wages. It was held that the contract was entire for six months, and the plaintiff could recover nothing until that time had expired, and that $8 per month was to be paid for $48 for the whole time. So in this case the contract was to work for a certain number of months, and plaintiff left before the time and could not recover nothing either upon a quantum meruit or upon the contract. It is needless to pursue the question further, as it is clear that the plaintiff could not recover, and [illegible] have been given as well as the refusal. [illegible] testimony of the plaintiff and the [illegible] to [illegible] matter, unless he [illegible] already

vented from so doing by a sickness which he could not have anticipated at the time of the making of the contract. The recent case of Bast v. Byrne, 51 Wis. 531; s. c. 37 Am. 841, is not in conflict with these views or this decision. In that case the entirety of the contract was not in question, but conceded, and the only question was whether the defendant had not waived his right to take advantage of its entirety by receiving back into his employment the plaintiff, after he had lost during the year several days by absence. It is said incidentally in the opinion in that case that holding such an opinion "is not going so far as the opinion of the court in Britton v. Turner," and that that case had been followed in other cases; and there the opinion says, and I think incorrectly, that "there are strong equitable reasons to sustain the doctrine of the above cases." The entirety of the contract is the only question in this case.

This is perhaps more than sufficient as to the general rule of service contracts, when the time of service is fixed, and it only remains to inquire whether the rate of compensation being fixed by the month will take this case out of this general rule and make the contract a divisible instead of an entire one, and allow a recovery from month to month, and for four months, as in this case, when the time of service is fixed at six months. Without authorities upon this exact question, it seems reasonable that the month is only mentioned in connection with the compensation to determine the rate or the whole amount. If otherwise, and this mention of the month determines the time for which the plaintiff is bound to service, then the mention of the six months' time was useless, and that part of the contract is not only contradictory to the other, but nugatory. But authorities in point are not wanting. In Lantry v. Parks, 8 Cow. 63, the contract was to work for one year at ten dollars per month. The plaintiff worked ten months and a half, and then left without cause. It was held that he could neither recover on an implied assumpsit nor on the contract. In Badgley v. Heald, 4 Gilm. 64, the contract was to work six months at $8 per month. The plaintiff left the defendant's employment at the end of three months, and sued for his wages as by the month. It was held that the contract was entire for six months, and that the plaintiff could collect nothing until that time had expired and he had fully performed, and that $8 per month was the same as if the contract had stipulated for $48 for the whole time. In Hansell v. Erickson, 28 Ill. 257, the contract was to work for a certain number of months at $15 per month, and plaintiff left before that time. It was held that he could recover nothing either upon a *quantum meruit* or on the contract. It is needless to pursue the question further. The instruction that the plaintiff could not recover, asked by the defendant, should have been given, as well as the others, to the same effect. On the testimony of the plaintiff and the son he certainly cannot recover in this action, unless he show in contradiction of that testimony already

given that the son left the service of the defendant, not because he refused to pay him from month to month, but by the fault of the defendant in some other way, or by the act of God, and by such act of God as the plaintiff could not have reasonably anticipated when he entered into the contract.

By the Court.—The judgment of the county court is reversed, and the cause remanded for a new trial in accordance with this opinion.[1]

YERRINGTON v. GREENE and Another.

1863. Supreme Court of Rhode Island. 7 R. I. 589.

Assumpsit against the defendants, as administrators on the estate of William W. Keach, for the recovery of damages for the breach of a contract by which the said Keach agreed to employ the plaintiff, at a salary, for three years, in his business.

At the trial of the case, under the general issue, at the March term of this court, 1863, before the chief justice, with a jury, it was proved by letters interchanged between the plaintiff, who then resided in Boston, and the intestate, who was a manufacturing jeweler, in Providence, that on the 19th day of March, 1860, the former agreed to serve the intestate, and the latter agreed to employ the plaintiff, as clerk and salesman, having charge of the intestate's office, or place of sale, in New York, and as agent in his business in making occasional trips for him to Philadelphia for the term of three years from the first day of April, 1860, or as soon thereafter as the plaintiff could obtain a release from his employment in Boston, at a salary of twelve hundred dollars for the first year, of thirteen hundred dollars for the second year, and of fifteen hundred dollars for the third year; that on the sixteenth day of April, 1860, the plaintiff entered into the service of the intestate, under this contract, and continued to serve him under it until the first day of April, 1861, when the said Keach died; that the defendants, as administrators of said Keach, continued to employ the plaintiff, at the stipulated salary, until the sixteenth day of June, 1861, when, having discontinued the office in New York, and removed what goods were there to Provi-

[1] In some jurisdictions it is held that although the contract is entire, and the agent or servant is at fault, yet if the principal has received some benefit from the service for which in equity and good conscience he ought to pay, he will be held liable for the value of the services. In such cases, however, the damages occasioned by the abandonment will be deducted. See Castlin v. Weeks, 2 Ind. App. 222; Wolf v. Gerr, 43 Ia. 339; Parcell v. McComber, 11 Neb. 209. Compare Allen v. McKibbin, 5 Mich. 449.

given him the use left the service of the defendant, not because he refused to pay him [illegible] month, or [illegible] of the defendant to some other [illegible] or by the act [illegible] for such act of God as the plaintiff could not have reasonably anticipated when he entered into the contract.

It is [illegible] that the decree of the court below is reversed, and the cause remanded [illegible] with this opinion.

VERMILYE & CRICKET and Another

1862. [illegible] 7 N. I. 589.

[illegible] as administrators of the estate of [illegible] and [illegible] as manager for the benefit of [illegible] agreed to employ the plaintiff, [illegible] to his business.

[illegible] the general issue. At the March [illegible] before [illegible] and a jury, it was [illegible] that the plaintiff, who then resided in [illegible], entered the defendants' manufacturing jeweller, in Providence, [illegible] on the 25th day of March, 1860, the former agreed to [illegible] and the latter agreed to employ the plaintiff, [illegible] having charge of the intestate's office or counting room in New York, and to assist in the business in making [illegible] to Philadelphia for the term of three years from the [illegible] 1860, or as soon thereafter as the plaintiff could [illegible] his engagement in Boston, at a salary or [illegible] the first year, at thirteen hundred dollars for the [illegible] year, and at fifteen hundred dollars for the third year; [illegible] month's day of March, 1861, the plaintiff entered into the [illegible] and continued to [illegible] until the 1st day of April, 1861, when the said Vermilye [illegible] the defendants as administrators of said Cricket, [illegible] the plaintiff, at the [illegible] salary, until the sixteenth [illegible] 1861, when, having discontinued the office in New York, [illegible] were given to Provi-

[illegible] contract [illegible] and the [illegible] has received part [illegible] the [illegible] for a [illegible] [illegible] to pay, he will be held [illegible] for the [illegible] and [illegible] the [illegible] [illegible] by the [illegible] [illegible] Cushing v. Wyeth, 2 Fed. Appendix, 9 [illegible] Co. v. [illegible] 46 Cooper, 37 Barb. 549. Compare Allen v. Webb, 4 [illegible] 28.

dence, where Keach had another place of sale, they declined longer to employ the plaintiff, or to pay him his salary, though from that time to the date of the writ he had been ready and willing to serve in said business, and had tendered his services in it to them, and had been unable to procure other employment; that the defendants, as administrators of Keach, wound up his business by selling the goods removed from New York, with other goods of his, at Providence, and had been allowed by the court of probate, for their services as administrators, the sum of three thousand dollars.

Upon this state of facts, the chief justice instructed the jury that the death of Keach terminated this contract of service, and that no recovery of damages could be had of the defendants, as his administrators, for their refusal to employ the plaintiff under it afterwards; whereupon, the jury having returned a verdict for the defendants, the plaintiff, having duly excepted thereto, now moved for a new trial, on the ground of error in law in said instruction.

Ames, C. J.—It is in general true that death does not absolve a man from his contracts; but that they must be performed by his personal representatives, or their non-performance compensated out of his estate. An exception to this rule, equally well established at both the civil and common law, is that in contracts in which performance depends upon the continued existence of a certain person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. The implication arises in spite of the unqualified character of the promissory words, because, from the nature of the contract, it is apparent that the parties contracted upon the basis of the continued existence of the particular person or chattel. The books afford many illustrations of this reasonable mode of construing contracts, *de certo corpore,* as the civil law designation of them is, in furtherance of the presumed and probable intent of the parties. The most obvious cases are the death of a party to a contract of marriage before the time fixed by it for the marriage; the death of an author or artist before the time contracted for the finishing and delivery of the book, picture, statue, or other work of art; the death of a certain slave promised to be delivered, or of a horse promised to be redelivered, before the day set for delivery or redelivery; and the death of a master or apprentice before the expiration of the term of service limited in the indentures. The bodily disability from supervening illness, as of an artist, from blindness, to paint the picture contracted for, or of a scholar to receive the instruction his father had stipulated should be received and paid for, has been held, for the like reason, to excuse each from the performance of his contract. Hall v. Wright, 1 El., B. & E. 746; Stewart v. Loring, 5 Allen 306. The cases in support of these, and other illustrations of the exception to the general rule, are set down in the defendants' brief, and it is unnecessary to repeat them. Both at the civil and the com-

mon law it is necessary that the party who would avail himself of this excuse for non-performance of the contract should be without fault in the matter upon which he relies as an excuse. The latest and most instructive case upon this subject, so far as the discussion of the principle of decision is concerned, is that of Taylor v. Caldwell, decided by the queen's bench in May last, 8 L. T., N. S., 356. In that case it was held that the parties were discharged from a contract to let a music hall for four specified days for a series of concerts, by the accidental destruction of the hall by fire before the first day arrived. The full and lucid exposition by Mr. Justice Blackburn, who delivered the opinion of the court, of the prior cases, and of the principle upon which they had been decided, leaves nothing further to be desired upon this subject.

Does the case at bar fall within the general rule or within the exception we have been considering? This must depend upon the nature of the contract, whether one requiring the continuing existence of the employer, Keach, for performance on his part, or one which could, according to its spirit and meaning, be performed by the defendants, his administrators. The contract was to employ the plaintiff as clerk and agent of the intestate in his business in New York and Philadelphia; and it seems to us undoubted that the continued existence of both parties to the contract for the whole stipulated term was the basis upon which the contract proceeded, and if called to their attention at the time of contract, must have been contemplated as such by them. The death of the plaintiff within the three years would certainly have been a legal excuse from the further performance of his contract; since it was an employment of confidence and skill, the duties of which, in the spirit of the contract, could be fulfilled by him alone. If this be the law in application to a covenant for ordinary service (Shep. Touch. 180), how much more in application to a contract for service of such confidence and skill as that of a clerk and agent for sale. On the other hand, this employment could continue no longer than the business in which the employer was engaged and the plaintiff retained. The intestate, when living, could by the contract have required the services of the plaintiff in no other business than that in which he had engaged him, and with no other person than himself. It would seem, then, necessarily to follow, that when the death of the employer put a stop to this business, and left no legal right over it in the administrators, except to close it up with the least loss to the estate of their decedent, they were, by the contract, bound no longer to employ the plaintiff, any more than he to serve them. The act of God had taken away the master and principal,—the law had revoked his agency, and stopped the business to which alone his contract bound him,—and if he would serve the administrators in winding up the estate, it must be under a new contract with them, and under renewed powers granted by them. Any other result than that this contract of service was

upon the implied condition that the employer, as well as the employed, was to continue to live during the stipulated term of employment, would involve us in the strange conclusion that the administrators might go on with the business of their intestate, in which the plaintiff must continue with powers unrevoked by the death of his principal, or that he, with new powers from them, was bound by the contract to serve them as new masters, and in a different service, and that they were bound to grant him such powers, and employ him for the stipulated time in such service. The novelty of such a claim, and the contradiction of well-settled principles necessary to maintain it, justify the ruling of the judge who tried the cause; and this motion must be dismissed with costs, and judgment entered upon the verdict.[1]

WOLFE v. HOWES.

1859. Court of Appeals of New York. 20 N. Y. 197.

Appeal from the supreme court. The complaint contained the common counts only for work, labor and services done by Nicholas Vache, the testator, for the defendants. The defendants denied the facts averred in the complaint, and set up as a separate defense that the work was done under a special contract not performed by Vache in his lifetime, and claimed damages for the breach of the contract on his part. The defendants had for nine years previous to May, 1852, been engaged as partners in carrying on the business of making glass at the Dunbarton glass-works, of which they were the proprietors, at Verona in the county of Oneida. The testator was in the employment of the defendants at their glass-works as a pot-maker. On the 1st of May, 1852, the defendants and testator entered into a contract in writing as follows:

"Memorandum of an agreement made this day. Howes, Scofield & Co. [defendants], of the first part, and Nicholas Vache of the second part, witnesseth, that for and in consideration of $1 to me in hand paid, the receipt whereof I do acknowledge, do agree on my part to do all the pot-room work for said parties of the first part, in a good and workmanlike manner, for one year from the date of this contract, at the price of $40 per month, $10 of which is to be paid me monthly. Dunbarton, May 1st, 1852. If extra help is needed, we agree to furnish it. (Signed) Nicholas Vache."

The trial was before a referee, who found the following facts:

[1] Insolvency of the principal is no defense to an action brought by the agent for failure to employ him for a specified term. Lewis v. Atlas Mutual Ins. Co., 61 Mo. 534.

The plaintiff's testator entered upon the performance of the contract, and continued to fulfill it in all respects according to the terms thereof, in a good and workmanlike manner from the 1st day of May, 1852, to the 7th day of December, following, when Vache became sick and unwell and so continued for a long time, and at length died. By reason of said sickness, and without fault on his part, he became and was incapable of further performance of his said contract.

He held as matter of law, that by reason of his sickness and death, Vache was released and discharged from the further performance of his contract, and his executor was entitled to recover a reasonable compensation for the services of his testator.

That such reasonable compensation was the sum of $40 per month, for the time of the testator's service; and after deducting certain payments made to him from time to time, there was a balance due of $159.28, for which he ordered judgment with costs. The defendants took several exceptions to the finding of the facts and the decisions of the referee on the questions of law, and particularly to the conclusion that Vache was released and discharged from further performance of the contract, and that the plaintiff was entitled to recover a reasonable compensation for the services rendered by his testator for the defendants, and in not allowing a sufficient amount of set-off. The supreme court, at general term in the fifth district, having affirmed the judgment entered on the report of the referee, the defendants appealed to this court.

Allen, J.—There can be little doubt, I think, that the contract with Vache contemplated his personal services. This is evident, both from the nature of the business and the amount of compensation agreed to be paid him. It is also manifest from the evidence on both sides. The business of pot-making required skill and experience. It was an art to be acquired after much study and labor, and which Vache seemed to have accomplished. The execution of the work required his constant and personal supervision and labor. No common laborer could have supplied his place, and hence the amount of his wages was largely increased beyond that of such a hand. The extra help mentioned in the contract had reference to the breaking away of the flattening, so called, and to its repair, and nothing else. The whole testimony shows this, as well as that the personal services of Vache were contracted for. The referee well found and court below well decided that such were the terms of the contract.

2. The question is then presented whether the executor of a mechanic, who has contracted to work for a definite period, and who enters upon his labor under the contract, and continues in its faithful performance for a portion of the time, until prevented by sickness and death, and without any fault on his part, from its final completion, can recover for the work and services thus performed by his testator.

The broad ground is taken on the part of the defendants' counsel, that no recovery can be had under such circumstances; that full performance was a condition precedent to the right of recovery, the agreement being general and absolute in its terms, and not providing for the contingency of sickness or death.

It has undoubtedly been long settled as a general principle, both in England and in this as well in most other states, that where the contract is entire, nothing but the default of the defendants will excuse performance. It will be found, however, on an examination of the leading cases in our own courts, that the failure to perform was owing to the fault or negligence of the party seeking to recover: McMillan v. Vanderlip, 12 Johns. 165 (7 Am. Dec. 299); Reab v. Moor, 19 *id.* 337; Jennings v. Camp. 13 *id.* 94; *id.* 390 (7 Am. Dec. 367); Sickels v. Pattison, 14 Wend. 257 (28 Am. Dec. 527); Langtry v. Parks, 8 Cow. 63, and various other cases. It is believed that not a single case can be found where the rule is laid down with such strictness and severity as the defendants' counsel asks for in the present case.

Some of the English cases do, indeed, rather intimate such a doctrine: Cutler v. Powell, 6 T. R. 320; Hadley v. Clarke, 8 *id.* 267; Appleby v. Dods, 8 East 300; Hulle v. Heightman, 2 *id.* 145, and some others. These cases are, however, capable of the same reasonable construction which the law confers upon all contracts. That of Cutler v. Powell, *supra,* is distinguishable in this, that by the peculiar wording of the contract it was converted into a wagering agreement, by which the party, in consideration of an unusually high rate of wages, undertook to insure his own life, and to render at all hazards his personal services during the voyage, before the completion of which he died.

The great principle upon which the adjudged cases in all the courts is based is the question, as stated in McMillan v. Vanderlip, 12 Johns. 165 (7 Am. Dec. 299), What was the real intention of the parties? The law gives a reasonable construction to all contracts. For instance, in the present case, did the parties intend that the contract should be binding upon the plaintiff's testator in case of unavoidable sickness or death, or did they intend, and is it to be implied, that each should perform, as to the other, according to the terms of the contract, *Deo volente?* It appears that a fair and legal interpretation would answer this question in the affirmative, and that such a provision must be understood as written in the contract. Nor is this principle wanting sanction either by elementary writers or adjudged cases. "Where the performance of a condition is prevented by the act of God, * * * it is excused:" Cru. Dig., tit. Condition, 41, 43; 3 Kent's Com. 471; 2 *id.* 509; Madeiros v. Hill, 8 Bing. 231. In Mounsey v. Drake, 10 Johns. 27, 29, the court say: "Performance must be shown, unless prevented by the act of God or of the law:" 1 Shep. Touch. 180; Gilbert on Covenants 472; Peo-

ple v. Manning, 8 Cow. 297 (18 Am. Dec. 451); People v. Bartlett, 3 Hill (N. Y.) 570; Carpenter v. Stevens, 12 Wend. 590; Chit. Con. 631; 1 Parsons on Cont. 524, and note; Fenton v. Clark, 11 Vt. 562; Fuller v. Brown, 11 Met. 440.

There is good reason for the distinction which seems to obtain in all cases, between the case of a wilful or negligent violation of a contract and that where one is prevented by the act of God. In the one case the application of the rule operates as a punishment to the person wantonly guilty of the breach, and tends to preserve the contract inviolable; while in the other its exception is calculated to protect the rights of the unfortunate and honest man who is providentially and without fault on his part prevented from a full performance. There is another reason for relaxing the rule, which is applicable to the case we are now considering. It is well set forth in Story on Bailments, § 36, and notes, where that learned jurist, after considering the great number of cases on this subject in the various courts of England and this country, and well observing that they are not at all times in harmony, remarks that the true rule may be considered to be, "that where the contract is for personal services which none but the promisor can perform, there inevitable accident or the act of God will excuse the non-performance, and enable the party to recover upon a *quantum meruit*. But where the thing to be done or work to be performed may be done by another person, then all accidents are at the risk of the promisor." In the present case the finding shows, and I have already remarked, justly, that the contract was personal, and that the executor could not have employed a third person to execute the contract on the part of his testator Vache.

But without pressing this point further, it is sufficient to say that it was virtually decided against the defendants by this court, in the case of Jones v. Judd, 4 Comst. 411. It was there decided that when by the terms of the contract for work and labor, the full price is not to be paid until the completion of the work, and that becomes impossible by the act of the law, the contractor is entitled to recover for the amount of his labor. In that case the work was stopped by the state officers in obedience to an act of the legislature suspending the work; and the court held that as the contractor was without fault, he was entitled to recover. The case of Mounsey v. Drake, 10 Johns. 27, was referred to and approved of as authority in favor of the position; and see Bebee v. Johnson, 19 Wend. 502 (32 Am. Dec. 518).

The conclusion, then, is that where the performance of work and labor is a condition precedent to entitle the party to recover, a fulfilment must be shown; yet that where performance is prevented or rendered impossible by the sickness or death of the party, a recovery may be had for the labor actually done. This is not out of harmony

with principle or adjudged cases, and is certainly in harmony with the rules of common honesty and strict justice.

These views dispose of the main questions in the case. It is necessary to notice one or two of minor importance.

It is insisted that if sickness were an excuse for the non-performance of the contract on the part of Vache, that such excuse should have been alleged in the complaint, and this not having been done, that the plaintiff is not entitled to recover. It is true that the plaintiff might have set up the agreement and the excuse for its non-performance, and entitle himself to recover upon such a pleading. But the complaint proceeds upon a *quantum meruit;* and upon showing the work and labor of Vache, the plaintiff entitled himself to recover. The defendants set up the special agreement as matter of defense, and the plaintiff's excuse was properly enough matter of reply. The contract was in fact discharged by the act of God, and its chief consequence was to measure the amount of the plaintiff's damages, or to regulate the compensation to which the plaintiff was entitled, though his remedy was as upon a *quantum meruit.* So say some of the cases already cited.

Again, it is said that if the plaintiff was entitled to recover anything, it could be only ten dollars a month, and that the defendants' set-off having been found by the referee to amount to more than that, the defendants were entitled to judgment. This objection is not tenable. The compensation was to be at the rate of forty dollars per month; ten dollars (a part) of which was to be paid monthly. This was upon the supposition that the contract was to be performed for the whole time. This, however, having been rendered impossible, the plaintiff was entitled to recover, if anything, the full value of the services of the testator, not exceeding the rate of compensation secured by the terms of the contract.

It is further urged that the referee erred in not allowing defendants' damages accruing to them after Vache was sick and before he quit. That was a question of fact entirely for the referee. He found that the plaintiff did his work well and skilfully down to the time of his sickness; he allowed and deducted the whole amount of set-off proved by defendants; and he does not find that the defendants sustained any damages by reason of any defect in Vache's work down to the time of his quitting in December, 1852. With these questions of fact we cannot interfere. The court below sanctioned the finding. I think they were fully warranted in so doing. At all events, we are not at liberty to interfere.

The judgment must be affirmed.

Johnson, C. J., concurred, observing that it was material that the defendants had received actual benefit from the services of the plaintiff's testator, and that quite a different question would be presented by a case where the services actually rendered should prove valueless; e. g., if one should be retained to compose an original literary

work, and having faithfully employed himself in preparation, should die without having completed any work of value to the employer.

COMSTOCK, J., and other judges concurred in this qualification.

Judgment affirmed.[1]

Section 2.—Duty to Reimburse Agent.

MOORE v. APPLETON.

1855. SUPREME COURT OF ALABAMA. 26 Ala. 633.

TRESPASS on the case by Claiborne G. Appleton against John Moore, "to recover damages sustained by plaintiff, growing out of certain acts performed by plaintiff, in the capacity of agent for defendant, in the year 1846, in dispossessing and removing one Aaron B. Quinby from a certain tract of land lying in Lawrence county, Alabama, and known as the place on which said defendant now keeps a toll-gate; which act of dispossessing and removing said Quinby was done at the special instance and request of defendant, and while plaintiff was acting as his agent."

The declaration contained two counts; the first alleging, in substance these facts: That defendant in 1846, constituted and appointed plaintiff his agent, generally and specially, to do and perform such acts and things as he might request plaintiff to do during the year of 1846; that afterwards, and while plaintiff was acting in the capacity of such agent for defendant, and at defendant's special instance and request, and as such agent, "plaintiff took possession of certain goods and chattels, to wit," etc.; "which goods and chattels defendant then, and before plaintiff so took possession of them as such agent, stated and represented to plaintiff, were the property of said defendant, and to the possession of which defendant represented to plaintiff that he (defendant) was then entitled, which statements and representations plaintiff then believed and acted on in so taking possession of said goods and chattels;" that afterwards, in March, 1847, one Aaron B. Quinby instituted suit against plaintiff and defendant, in the circuit court of Lawrence, to recover damages sustained by him in consequence of the taking possession of said goods and chattels by plaintiff; that after certain proceedings were regularly had in said suit, a judgment was rendered against plaintiff and defendant, in favor of said Quinby's administrator, for $200 damages, besides costs, which amounted to $435.58; that an execution

[1] *Accord:* Coe v. Smith, 4 Ind. 79. Compare Lakeman v. Pollard, 43 Me. 463, and Jennings v. Lyons, 39 Wis. 553.

work, and having faithfully accounted himself in accordance, should be without having committed any wrong or crime to his employer.

Judgment affirmed.

Section 2.—Duty to Restore Agent

[illegible] v. APPLETON

[illegible] 63 Me. 633

Trespass on the case by Osborne G. Appleton against John [illegible] for damages sustained by plaintiff growing out of certain acts [illegible] by plaintiff in the capacity of agent for defendant, [illegible] to dispossess and remove one Aaron P. Osborne [illegible] tract of land lying in Lawrence county, [illegible] the place on which said defendant now [illegible] act of dispossessing and removing said [illegible] special request and request of defendant, [illegible] to his arrest.

The declaration contains the first alleging, in substance, that [illegible] in 1865, constituted and appointed plaintiff [illegible] generally and especially, to do and perform [illegible] acts and things in his name [illegible] request plaintiff to do during the [illegible] and while plaintiff was acting in the capacity of said agent [illegible] and defendant's special instance and request and as [illegible] agent, plaintiff took possession of certain goods [illegible] and chattels, etc., [illegible] goods and chattels defendant then [illegible] plaintiff as said [illegible] of them as such agent, [illegible] in pursuance [illegible] the property of said defendant, and [illegible] possession of [illegible] defendant represented to plaintiff that he [illegible] was then [illegible] such statements and representations [illegible] that believed and acted [illegible] in so taking possession of said goods and chattels; that afterwards, in March, 1867, one Aaron [illegible] plaintiff instituted [illegible] against plaintiff and defendant, in the [illegible] court in Lawrence, [illegible] damages sustained by him in consequence of the taking [illegible] of said goods and chattels by plaintiff; that after certain proceedings were regularly had in said [illegible] judgment was rendered against plaintiff and defendant, in favor [illegible] said County's [illegible] for $200 damages, besides [illegible] which amounted in [illegible] to $[illegible], that an execution

to pay $325.97; that in addition to this, plaintiff was obliged to pay out large sums of money in defending said suit, attorneys' fees, etc., whereby plaintiff has been greatly damaged, etc.

The second count, after alleging the agency as above stated, averred that plaintiff, "while acting in the capacity of such agent for defendant, and as such agent, and at defendant's special instance and request, and by his direction, and on his behalf, purchased from one Sarah Quinby certain goods and chattels," etc.; that afterwards, and after said purchase was made, defendant ratified the same, proceeded to and did take possession of said goods and chattels; "that Aaron B. Quinby afterwards instituted suit against plaintiff, to recover damages for the taking away of said goods and chattels; that judgment was rendered in said suit, on which execution issued, and plaintiff was compelled to pay, etc.; whereby he has sustained great damage, etc.

The defendant demurred to each count in the declaration, but his demurrer was overruled, and he then pleaded not guilty, with leave to give in evidence any special matter of defense. The defendant also demurred to the plaintiff's evidence, but the court held it sufficient, and judgment was rendered accordingly.

The rulings of the court are now assigned for error.

Rice, J.—Every man who employs another to do an act which the employer appears to have a right to authorize him to do undertakes to indemnify him for all such acts as the agent does not know to be unlawful, and as would be lawful if the employer had the authority he pretends to have. Adamson v. Jarvis, 4 Bing. 66; Story on Agency, § 339.

Where two persons are claiming title to personal property adversely to each other, and one of these claimants calls upon the other person to take it, and the latter has reasonable ground to believe that his employer is the owner of the property, and therefore takes it, without knowing at the time that such taking is a trespass or tort, a promise of indemnity will be implied to such person, although it subsequently turns out that the title of employer was not good, and the act of taking a trespass. Avery v. Halsey, 14 Pick. 174.

In all such cases a promise of indemnity is implied upon the plain dictates of reason and natural justice. Gower v. Emery, 18 Me. 79; Parsons on Con. 36, n. (x).

The promise thus implied extends only to such losses and damages as are direct and immediate, and naturally flow from the execution of the agency. In other words, the agency must be the cause, and not merely the occasion of the losses or damages, to found a just right to reimbursement. Story on Agency, § 341; Story on Contracts, § 176.

Assumpsit lies upon such implied promises. An action on the case is equally maintainable, and is said to be the more appropriate rem-

edy. Myers v. Gilbert, 18 Ala. 467; Adamson v. Jarvis, and other cases cited *supra*. But whether the action be assumpsit or case, the declaration is bad, on demurrer, if no breach is stated in it. 1 Chitty's Pl. 337.

When the declaration is in case, as it is here, and shows that the losses for which the agent is seeking indemnity from the principal, are certain damages recovered against the agent for taking property by the direction of the principal, in an action for trespass brought against the agent by the true owner of the property, the declaration is defective, if it omits to state that the taking by the agent was without knowledge on his part, at the time of the taking, that it was a trespass. The agent must, in his declaration, negative the existence of such knowledge on his part, although the *onus* of proving the existence of such knowledge may be on the principal; for the rule, that the *allegata* and *probata* must correspond, is not of universal application. Carpenter v. Devon, 6 Ala. 718.

Each count of this declaration is bad, for the omission of a breach, and also for failing to aver that the agent, at the time of the taking, did not know that it was a trespass or tort.

An averment that the principal had notice of the losses and damages sustained by the agent set forth in the declaration, and failed to pay the same, would be a good breach in such a case as this.

We admit the rule, that the law will not enforce contribution nor indemnity between wrong-doers. But that rule does not apply to any case, where the act of the agent was not manifestly illegal in itself, and was done *bona fide* in the execution of his agency, and without knowledge (either actual, or implied by law) that it was illegal. Parsons on Contracts, p. 36, note (x).

That rule is applicable, whenever it appears that the act of the agent was manifestly illegal in itself. For example, if A employs B to assault C, and B thereupon does assault C, and is subjected to damages therefor, B cannot recover such damages from A, the act of B being clearly illegal in itself, the law implies that he knew it to be so, and therefore will not enforce his claim to indemnity.

The rule also applies, whenever it appears that, although the act of the agent was not manifestly illegal in itself, yet, in fact, he knew it to be unlawful at the time he did it. For example, if Appleton, at the time he took the property claimed by Moore, knew that Moore had no just nor lawful right to it, and that Moore's claim was groundless and iniquitous, and that it really belonged to some other person, such knowledge on the part of Appleton at the time of the taking, would defeat any recovery by him for any loss resulting from such taking, although he took it as the agent of Moore, and by Moore's direction. Chappell v. Wysham, 4 Harris & Johns. 560.

For the error of the court below in overruling the demurrer to

several counts of the declaration, its judgment is reversed, and the cause remanded.[1]

MAITLAND v. MARTIN.

1878. Supreme Court of Pennsylvania. 86 Pa. St. 120.

Mercur, J.—This action was brought by the defendant in error for money had and received for her use. The money sought to be recovered came into the hands of the plaintiffs in error under the following circumstances: In August, 1873, being brokers in the city of Philadelphia, they purchased for the defendant in error five South Carolina bonds, of the nominal value of $1,000 each. She left the bonds in their possession. They were sealed up in an envelope, her name endorsed thereon, and deposited in the safe of the plaintiffs in error in the "Fidelity." They thus remained until May, 1875, when she instructed the plaintiffs in error to sell them, at thirty-three per cent. There being no market in Philadelphia for them, on the 12th of May they directed their correspondents, Cecil, Stout & Thayer, brokers in New York, to sell them. By dispatch, on the 14th of May, they advised the plaintiffs in error that they had sold at the price named. Immediately thereafter the plaintiffs notified the defendant of the sale. On the same day the plaintiffs forwarded the bonds to their correspondents by express, and requested a draft to be remitted for net proceeds. On receipt of the bonds, Cecil, Stout & Thayer remitted the proceeds to plaintiffs in error on the 15th of May. On the 17th of May, and while the proceeds remained in the hands of the plaintiffs in error, they were notified by Cecil, Stout & Thayer that three of the bonds were not fundable, and not a good delivery at the price for which they had sold them; and, therefore, they had purchased others at the same price to supply the place of those not fundable, and held the plaintiffs in error for the sum thus advanced. On the same day the plaintiffs in error advised the defendant of the substance of this notice, and further requested her to consider the sale of 3,000 of the bonds reported by them sold, as canceled. They also directed Cecil, Stout & Thayer to return the three bonds not accepted, and draw on them for the sum paid. Thereupon Cecil,

[1] "Where an agent, acting faithfully, without fault, in the proper service of his principal, is subjected to expense, he ought to be reimbursed. If sued on a contract made in the course of his agency pursuant to his authority, though the suit be without cause, and he eventually succeeds, the law implies that the principal will indemnify him, and refund the expense. For this he can maintain an action of *indebitatus assumpsit;* and the proof of these facts will be sufficient to warrant the jury to find the promise." Swift, Ch. J., in Stocking v. Sage, 1 Conn. 518, 521.

Stout & Thayer returned the bonds, and the plaintiffs in error paid them the sum which they had advanced.

The plaintiffs in error offered to return the three bonds to the defendant, and account for the proceeds of the two others; but she denies their right to hold her responsible for the money thus paid by them, and seeks to recover the whole sum agreed to be paid for the five bonds.

It appears, by the evidence, that about the 1st of June, 1874, the treasurer of the state of South Carolina issued a notice that certain bonds of that state had been declared null and void by the legislature, and would not be recognized. Thereupon, June 2d, 1874, the New York Stock Exchange made an order that the bonds embraced in said notice should not pass, as a good delivery, on a sale of regular "South Carolina bonds," after that date. Three of these bonds appear to have been repudiated by the legislature, and at the time of the sale, in May, 1875, were not fundable, and as a consequence were almost worthless. Cecil, Stout & Thayer professed to sell "fundable bonds" only. They supposed all of the five to be of that class. The purchaser had a right to suppose he was buying such. Discovering that three of them were not of that kind, he refused to accept them. Cecil, Stout & Thayer thereupon replaced them with such bonds as filled the contract. If these facts be proved, they undoubtedly had a valid claim against the persons in whose behalf they agreed to make the sale. At the time the plaintiffs in error directed them to make the sale, they did not disclose the name of their principal; yet this in no manner changed the legal rights and liabilities between her and them. The specific bonds were her property. The plaintiffs were her agents to effect the sale. It was to be made for her benefit. The plaintiffs were bound to due care, prudence and diligence in the execution of the powers committed to them. These they appear to have exercised. They kept their principal informed of their action. The defendant is not shown to have sustained any damage by reason of any information being withheld from her. These bonds had depreciated while owned by her. If the plaintiffs in error, while acting as her agents in effecting the sale, without any fault on their part, became liable, she, and not they, must bear the loss.

The object to be effected was the sale of the bonds. The plaintiffs in error, as well as Cecil, Stout & Thayer, were acting as agents to reach that end. An agreement to sell fundable bonds, and a payment by the purchaser to one agent, and his transmission to another agent, did not necessarily complete the transaction.

It required a delivery, or a readiness to deliver the bonds, of the kind sold, according to the contract. Anything less than that left the transaction incomplete, unless further fulfilment was waived.

In fully perfecting a sale the plaintiffs in error were strictly in the line of their duty. We discover nothing affecting their good

[illegible] If they, without fault on [illegible] the honest management of the business of the [illegible] damages must be borne by [illegible] Gooding v. Sage, 1 Conn. 519; In re [illegible]

If the plaintiffs in error [illegible] made with the purchasers, [illegible] their own and relieve the [illegible] indorse them. Although [illegible] express consent and authority [illegible] thereby necessarily accept [illegible] to be as stated, the [illegible] words. If so justified, [illegible] debts of the plaintiffs [illegible] and their acts [illegible] Although by failing [illegible] may have become [illegible] Stout & Driver, yet that does not bar the [illegible] the defendant to make them [illegible] portion of the charge [illegible] and the assignments are [illegible]

Judgment reversed [illegible]

Section 3.—Employer's Liability.

[1] [illegible]

FARWELL v. BOSTON & WORCESTER RAILROAD CORPORATION.

1842. Supreme Judicial Court of Massachusetts. [illegible]

In an action of trespass [illegible] to recover damages for an injury [illegible] in consequence of the negligence [illegible] a servant of the defendants, [illegible] employment of an engineer [illegible] the management of the locomotive engines and cars running on their railroad, [illegible] and entered into and [illegible] engaged for duties as engineer [illegible] Carter, [illegible] the defendants, at Newton, [illegible] their engines [illegible] and unskilful manner [illegible] and upon the plaintiff's [illegible] the plaintiff was [illegible] railroad, that the engine and cars, upon which the plaintiff was [illegible]

[1] [illegible] a servant of [illegible] such a contract [illegible] from the employer [illegible] of another servant [illegible]

Opinion of the Court.

faith. If, then, without fault on their part in the honest management of the business of the defendant, they incurred damages, those damages must be borne by her and not by them. Stocking v. Sage, 1 Conn. 519; D'Arcy v. Lyle, 5 Binn. 441; Whart. on Agents, § 316.

If the plaintiffs in error in good faith carried out the contract made with the purchaser, they did not thereby adopt the loss as their own and relieve the defendant from her legal obligation to reimburse them. Although they took back the bonds, without the express consent and authority of the defendant, yet they did not thereby necessarily accept them as their own. If the facts are found to be as stated, the purchaser was justified in refusing to accept the bonds. If so justified, it was clearly within the general scope and authority of the plaintiffs in error, as her agents, to fulfil the contract, and their acts, in contemplation of law, became her acts. Although by failing to disclose their principal, the plaintiffs in error may have become personally liable to Cecil, Stout & Thayer, yet that does not bar the right of the plaintiffs in error to require the defendant to make their loss good. It therefore follows that many portions of the charge were too unfavorable to the plaintiffs in error, and the assignments are substantially sustained.

Judgment reversed and a *venire facias de novo* awarded.[1]

Section 3.—Employer's Liability.

(a) FELLOW-SERVANT RULE.

FARWELL v. BOSTON & WORCESTER RAILROAD CORPORATION.

1842. SUPREME JUDICIAL COURT OF MASSACHUSETTS. 4 Met. 49.

IN an action of trespass upon the case, the plaintiff alleged in his declaration that he agreed with the defendants to serve them in the employment of an engineer in the management and care of their engines and cars running on their railroad between Boston and Worcester, and entered on said employment, and continued to perform his duties as engineer till October 30th, 1837, when the defendants, at Newton, by their servants, so carelessly, negligently and unskilfully managed and used, and put and placed the iron match rail, called the short switch, across the rail or track of their said railroad, that the engine and cars, upon which the plaintiff was en-

[1] In Mohr v. Miesen, 47 Minn. 228, it was held that an agent cannot recover from his principal for advances made in illegal transactions.

gaged and employed in the discharge of his said duties of engineer, were thrown from the track of said railroad, and the plaintiff, by means thereof, was thrown with great violence upon the ground; by means of which one of the wheels of one of said cars passed over the right hand of the plaintiff, crushing and destroying the same.

The case was submitted to the court on the following facts agreed by the parties: "The plaintiff was employed by the defendants, in 1835, as an engineer, and went at first with the merchandise cars, and afterwards with the passenger cars, and so continued till October 30, 1837, at the wages of two dollars per day; that being the usual wages paid to engine-men, which are higher than the wages paid to a machinist, in which capacity the plaintiff formerly was employed.

"On the 30th of October, 1837, the plaintiff, then being in the employment of the defendants, as such engineman, and running the passenger train, ran his engine off at a switch on the road, which had been left in a wrong condition, (as alleged by the plaintiff, and, for the purpose of this trial, admitted by the defendants,) by one Whitcomb, another servant of the defendants, who had been long in their employment, as a switch-man or tender, and had the care of switches on the road, and was a careful and trustworthy servant, in his general character, and as such servant was well known to the plaintiff. By which running off, the plaintiff sustained the injury complained of in his declaration.

"The said Farwell (the plaintiff) and Whitcomb were both appointed by the superintendent of the road, who was in the habit of passing over the same very frequently in the cars, and often rode on the engine.

"If the court shall be of opinion that, as matter of law, the defendants are not liable to the plaintiff, he being a servant of the corporation, and in their employment, for the injury he may have received from the negligence of said Whitcomb, another servant of the corporation, and in their employment, then the plaintiff shall become nonsuit; but if the court shall be of opinion, as matter of law, that the defendants may be liable in this case, then the case shall be submitted to a jury upon the facts which may be proved in the case; the defendants alleging negligence on the part of the plaintiff."

Shaw, C. J.—This is an action of new impression in our courts, and involves a principle of great importance. It presents a case, where two persons are in the service and employment of one company, whose business it is to construct and maintain a railroad, and to employ their trains of cars to carry persons and merchandise for hire. They are appointed and employed by the same company to perform separate duties and services, all tending to the accomplishment of one and the same purpose—that of the safe and rapid transmission of the trains; and they are paid for their respective

services according to the nature of their respective duties, and the labor and skill required for their proper performance. The question is, whether, for damages sustained by one of the persons so employed, by means of the carelessness and negligence of another, the party injured has a remedy against the common employer. It is an argument against such an action, though certainly not a decisive one, that no such action has before been maintained.

It is laid down by Blackstone, that if a servant, by his negligence, does any damage to a stranger, the master shall be answerable for his neglect. But the damage must be done while he is actually employed in the master's service; otherwise, the servant shall answer for his own misbehavior. 1 Bl. Com. 431. M'Manus v. Crickett, 1 East 106. This rule is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it. If done by a servant, in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so far the act of the master, that the latter shall be answerable *civiliter*. But this presupposes that the parties stand to each other in the relation of strangers, between whom there is no privity; and the action, in such case, is an action sounding in tort. The form is trespass on the case, for the consequential damage. The maxim *respondeat superior* is adopted in that case, from general consideration of policy and security.

But this does not apply to the case of a servant bringing his action against his own employer to recover damages for an injury arising in the course of that employment, where all such risks and peril as the employer and the servant respectively intend to assume and bear may be regulated by the express or implied contract between them, and which, in contemplation of law, must be presumed to be thus regulated.

The same view seems to have been taken by the learned counsel for the plaintiff in the argument; and it was conceded, that the claim could not be placed on the principle indicated by the maxim *respondeat superior*, which binds the master to indemnify a stranger for the damage caused by the careless, negligent or unskilful act of his servant in the conduct of his affairs. The claim, therefore, is placed, and must be maintained, if maintained at all, on the ground of contract. As there is no express contract between the parties, applicable to this point, it is placed on the footing of an implied contract of indemnity, arising out of the relation of master and servant. It would be an implied promise, arising from the duty of the master to be responsible to each person employed by him, in the conduct of every branch of business, where two or more persons are employed, to pay for all damage occasioned by the negli-

gence of every other person employed in the same service. If such a duty were established by law—like that of a common carrier, to stand to all losses of goods not caused by the act of God or of a public enemy—or that of an innkeeper, to be responsible, in like manner for the baggage of his guests; it would be a rule of frequent and familiar occurrence, and its existence and application, with all its qualifications and restrictions, would be settled by judicial precedents. But we are of opinion that no such rule has been established, and the authorities, as far as they go, are opposed to the principle. Priestley v. Fowler, 3 Mees. & Welsb. 1; Murray v. South Carolina Railroad Company, 1 McMullan 385.

The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others. To say that the master shall be responsible because the damage is caused by his agents, is assuming the very point which remains to be proved. They are his agents to some extent, and for some purpose; but whether he is responsible, in a particular case, for their negligence, is not decided by the single fact that they are, for some purposes, his agents. It seems to be now settled, whatever might have been thought formerly, that underwriters cannot excuse themselves from payment of a loss by one of the perils insured against, on the ground that the loss was caused by the negligence or unskilfulness of the officers or crew of the vessel, in the performance of their various duties as navigators, although employed and paid by the owners, and, in the navigation of the vessel, their agents. Copeland v. New England Marine Ins. Co., 2 Met. 440-443, and cases there cited. I am aware that the maritime law has its own rules and analogies, and that we cannot always safely rely upon them in applying them to other branches of law. But the rule in question seems to be a good authority for the point, that persons are not to be responsible, in all cases, for the negligence of those employed by them.

If we look from considerations of justice to those of policy, they will strongly lead to the same conclusion. In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their

practical application, best promote the safety and security of all parties concerned. This is, in truth, the basis on which implied promises are raised, being duties legally inferred from a consideration of what is best adapted to promote the benefit of all persons concerned, under given circumstances. To take the well-known and familiar cases already cited; a common carrier, without regard to actual fault or neglect in himself or his servants, is made liable for all losses of goods confided to him for carriage, except those caused by the act of God or of a public enemy, because he can best guard them against all minor dangers, and because, in case of actual loss, it would be extremely difficult for the owner to adduce proof of embezzlement or other actual fault or neglect on the part of the carrier, although it may have been the real cause of the loss. The risk is therefore thrown upon the carrier, and he receives, in the form of payment for the carriage, a premium for the risk which he thus assumes. So of an innkeeper; he can best secure the attendance of honest and faithful servants, and guard his house against thieves. Whereas, if he were responsible only upon proof of actual negligence, he might connive at the presence of dishonest inmates and retainers, and even participate in the embezzlement of the property of the guests, during the hours of their necessary sleep, and yet it would be difficult, and often impossible, to prove these facts.

The liability of passenger carriers is found on similar considerations. They are held to the strictest responsibility for care, vigilance and skill, on the part of themselves and all persons employed by them, and they are paid accordingly. The rule is founded on the expediency of throwing the risk upon those who can best guard against it. Story on Bailments, 590, and seq.

We are of opinion that these considerations apply strongly to the case in question. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service, if the common employer will not take such precautions, and employ such agents as the safety of the whole party may require. By these means, the safety of each will be much more effectually secured, than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrong-doer.

In applying these principles to the present case, it appears that the plaintiff was employed by the defendants as an engineer, at the rate of wages usually paid in that employment, being a higher rate than

the plaintiff had before received as a machinist. It was a voluntary undertaking on his part, with a full knowledge of the risks incident to the employment and the loss was sustained by means of an ordinary casualty, caused by the negligence of another servant of the company. Under these circumstances, the loss must be deemed to be the result of a pure accident, like those to which all men, in all employments, and at all times, are more or less exposed; and like similar losses from accidental causes, it must rest where it first fell, unless the plaintiff has a remedy against the person actually in default; of which we give no opinion.

It was strongly pressed in the argument, that although this might be so, where two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus to some extent provide for his own security; yet that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree control or influence the conduct of another. But we think this is founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish, what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, how near or how distant must they be, to be in the same or different departments. In a blacksmith's shop, persons working in the same building, at different fires, may be quite independent of each other, though only a few feet distant. In a ropewalk, several may be at work on the same piece of cordage, at the same time, at many hundred feet distant from each other, and beyond the reach of sight and voice, and yet acting together.

Besides, it appears to us, that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability, because the servant has better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer; but because the implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow servant, does not depend exclusively upon the consideration, that the servant has

better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments cannot create that liability, when it does not arise from express or implied contract, or from a responsibility created by law to third persons, and strangers, for the negligence of a servant.

A case may be put for the purpose of illustrating this distinction. Suppose the road had been owned by one set of proprietors whose duty it was to keep it in repair and have it at all times ready and in fit condition for the running of engines and cars, taking a toll, and that the engines and cars were owned by another set of proprietors, paying toll to the proprietors of the road, and receiving compensation from passengers for their carriage; and suppose the engineer to suffer a loss from the negligence of the switch-tender. We are inclined to the opinion that the engineer might have a remedy against the railroad corporation; and if so, it must be on the ground, that as between the engineer employed by the proprietors of the engines and cars, and the switch-tender employed by the corporation, the engineer would be a stranger, between whom and the corporation there could be no privity of contract; and not because the engineer would have no means of controlling the conduct of the switch-tender. The responsibility which one is under for the negligence of his servant, in the conduct of his business, towards third persons, is founded on another and distinct principle from that of implied contract, and stands on its own reasons of policy. The same reasons of policy, we think, limit this responsibility to the case of strangers, for whose security alone it is established. Like considerations of policy and general expediency forbid the extension of the principle, so far as to warrant a servant in maintaining an action against his employer for an indemnity which we think was not contemplated in the nature and terms of the employment, and which, if established, would not conduce to the general good.

In coming to the conclusion that the plaintiff, in the present case, is not entitled to recover, considering it as in some measure a nice question, we would add a caution against any hasty conclusion as to the application of this rule to a case not fully within the same principle. It may be varied and modified by circumstances not appearing in the present case, in which it appears, that no wilful wrong or actual negligence was imputed to the corporation, and where suitable means were furnished and suitable persons employed to accomplish the object in view. We are far from intending to say that there are no implied warranties and undertakings arising out of the relation of master and servant. Whether, for instance, the employer would be responsible to an engineer for a loss arising from a defective or ill-constructed steam engine: Whether this would depend upon an implied warranty of its goodness and sufficiency, or upon the fact of wilful misconduct, or gross negligence on the part of the employer, if a natural person, or of the superintendent or im-

mediate representative and managing agent, in case of an incorporated company—are questions on which we give no opinion. In the present case, the claim of the plaintiff is not put on the ground that the defendants did not furnish a sufficient engine, a proper railroad track, a well-constructed switch, and a person of suitable skill and experience to attend it; the gravamen of the complaint is, that that person was chargeable with negligence in not changing the switch, in the particular instance, by means of which the accident occurred, by which the plaintiff sustained a severe loss. It ought, perhaps, to be stated, in justice to the person to whom this negligence is imputed, that the fact is strenuously denied by the defendants, and has not been tried by the jury. By consent of the parties, this fact was assumed without trial, in order to take the opinion of the whole court upon the question of law, whether, if such was the fact, the defendants, under the circumstances, were liable. Upon this question, supposing the accident to have occurred, and the loss to have been caused, by the negligence of the person employed to attend to and change the switch, in his not doing so in the particular case, the court are of opinion that it is a loss for which the defendants are not liable, and that the action cannot be maintained.

Plaintiff nonsuit.[1]

VALTEZ v. OHIO AND MISSISSIPPI RAILWAY COMPANY.

1877. Supreme Court of Illinois. 85 Ill. 500.

Mr. Justice Breese delivered the opinion of the court.

This was case, in the St. Clair circuit court, by Joseph Valtez, plaintiff, and against the Ohio and Mississippi Railway Company, defendant, to recover damages for a personal injury caused by the negligence of defendant's servants. The questions came before us on a demurrer to the evidence, which had been adjudged in favor of the defendant, and a judgment rendered against plaintiff for the costs, to reverse which he appeals, and makes the point that the demurrer was not properly framed, and should have been overruled on the ground, and for the reason, that it admitted the evidence, instead of the facts which the evidence established.

We do not appreciate the force of this objection as now made, as the record shows the plaintiff voluntarily, without any order of the court, joined in the demurrer, thus distinguishing the case from that of Dormandy v. The State Bank, 2 Scam. 236. It is the office of a demurrer to the evidence, to withdraw the issues from the jury,

[1] See article, "American Law Concerning Employer's Liability," in 24 Am. Law Rev. 175.

in order that the court may pronounce the law upon the facts admitted by the demurrer. The defendant, in effect, says to the plaintiff, by demurring to the evidence, that all the facts such evidence tends to prove are admitted to exist, but upon those facts you are not entitled to recover, and on that we demand the judgment of the court.

What are the material facts admitted by the demurrer? That plaintiff was in the employment and service of the defendant, together with other servants and employees, in repairing cars, at its depot in East St. Louis; that the usual place of making such repairs was in a shed, into which one or more tracks of the company entered; that the person in charge of the repair gang, one Rein, directed this car, which required new springs to be attached, should be placed on the "dead track," so called for the reason that cars not in use were placed there, and where there would be less switching and less danger than in the shed; that while he was so employed, he, by the negligence and carelessness of another servant of the company, employed on the same track at this depot, was badly injured. This is the substance of the proof, and the question, so often decided by this court, of *respondeat superior,* arises. It is unnecessary to cite the numerous cases wherein this court has held that one servant cannot recover from the common master, for injuries done by a fellow servant in the same line of employment, if the master has selected trusty and competent servants, and of this there is no dispute. The accident was caused by the driver of a switch engine, there employed, mistaking the signal of the yard master. Plaintiff knew, when he entered into the employment of the company, the hazard attending his vocation, and, for the emoluments of his position, assumed the usual and ordinary hazards of the service into which he entered. He knew the company employed many men, and had a right to believe some of them might be careless and negligent in the performance of a duty, and this hazard he voluntarily accepted. Those who are engaged in the service of the same master, in carrying on and conducting the same general business, in which the usual instrumentalities are used, may justly be considered fellow servants. A proper test of the existence of this relation may be to inquire whether the negligence of the one is likely to inflict injury on the other, as claimed by appellee in its argument. This is not unlike the case of the Chicago and Alton Railroad Company v. Murphy, Admx., 53 Ill. 336. It was there said, where the ordinary duties and occupations of the servants of a common master are such that one is necessarily exposed to hazard by the carelessness of another, they must be supposed to have voluntarily taken the risks of such possible carelessness when they entered the service, and must be regarded as fellow servants within the rule.

It is very plain appellant knew, when he entered the service of this company, he would be exposed to the action of other servants of

the company; that, on an emergency, he might be called upon to make repairs, as in this case, not in the shed, but on a track, and be exposed to the acts of engine-drivers and others, whose business called them on to the same track. Admitting, as the demurrer does, all the facts and the inferences fairly to be drawn from them, there is no cause of action made out, and the circuit court did right in sustaining the demurrer, and its judgment must be affirmed. See case of Illinois Central Railroad Company v. Modglin, ante, p. 481.

Judgment affirmed[1].

DANIELS v. UNION PACIFIC RAILWAY COMPANY.

1890. Supreme Court of Utah. 6 Utah 357.

Blackburn, J.—This is a suit by a brakeman, an employee of the defendant company, for an injury to him while in the line of his duty on a train that was wrecked. He was severely injured, and permanently in one leg and one of his shoulders, so as to be unable to perform manual labor. The evidence tends to show that the train on which the plaintiff was at work as brakeman was wrecked by a broken wheel; that there was an old crack in the wheel, which could have been seen by proper inspection; and the question was fairly submitted to the jury, and they found that this was negligence in the defendant company. We think the evidence abundantly supports this finding. It was the duty of the company to furnish reasonably safe cars for the running trains, and to have them inspected with reasonable care at proper intervals; and, if an employee was injured by a neglect to perform this duty, the company is liable to him for the damage he sustained. On this branch of the subject we see no error.

The instructions, as we think, state well and fairly the law of the

[1] In Chicago, etc., R. R. Co. v. Kneirim, 152 Ill. 458, it was held that it was a question for the jury to decide whether a helper in a train yard is a fellow servant with a brakeman on a train coming from a distance.

"The question as to who are fellow servants is a mixed question of law and fact." Gary, J., in Wilson v. Railway Co., 51 S. Car. 79, 96.

In Wilson v. Madison, etc., R. R. Co., 18 Ind. 226, the plaintiff, a general employee of the railroad, was injured while uncoupling freight cars. On page 230 Worden, J., said: "The fact that the plaintiff, under his employment, had duties to perform other than coupling and uncoupling cars, can make no difference in the case. If he received an injury while in the performance of that service, his rights can neither be enlarged nor diminished by the fact that his employment embraced other service."

In Spees v. Boggs, 198 Pa. St. 112, it was held that a girl employed in the tailoring department of a dry goods store is a fellow servant of a boy employed to run an elevator set apart for the exclusive use of employees.

DANIELS v. [illegible] ELECTRIC RAILWAY COMPANY

[illegible]

case, and no point is made on them in the brief of the appellant's counsel; but the contention of the defendant company is that, if there was negligence, it was the negligence of the car-inspector, and he was the fellow servant of the respondent. If this contention is true, the respondent cannot recover, and this case should be reversed. As to who are fellow servants, there have been a great many and great variety of decisions, and it would serve no useful purpose to review them. However various, the decisions agree that the weight of authority is that, in order to constitute servants of one master fellow servants, within the rule *respondeat superior,* they must be engaged in the same line of work, be under control of the same foreman, be employed and discharged by the same head of the department in which they work; that they labor together in such personal relations that they can exercise an influence upon each other promotive of proper caution in respect of their mutual safety; that they shall be at the time of the injury directly co-operating with each other in the particular business in hand, or that their mutual duties shall bring them into habitual conassociation, as that they may exercise an influence upon each other promotive of proper caution, and to be so situated in their labor, to some extent, to supervise and watch the conduct of each other as to skill, diligence and carefulness. Railroad Co. v. Kelly, 127 Ill. 637, 21 N. E. 203. The evidence in this case clearly shows that the inspector of cars is not in the same line of work with the brakeman. He has nothing to do with the running of trains; is not under control of the conductor, but reports to, is appointed by, and may be discharged by, and is under the direction of, the foreman of the repair shops; has no conassociation with, and is rarely seen by, the brakeman on the train, unless casually noticed by him when the train is stopped. They have no work in common; are not so associated in their labor as to be able to act together in a way promotive of their mutual safety. We cannot say, therefore, as a matter of law, that the car inspector, in this case, was a fellow servant of the respondent when the accident occurred.

It is contended, also, by appellant that the damages are excessive. On that point the jury were properly instructed. It is peculiarly the province of the jury to estimate the damages in this class of cases; and they doubtless took into consideration, what they were legally authorized to do, that the respondent was lamed and deformed in one leg for life, and permanently disabled in one shoulder, so that he was wholly rendered unable to perform manual labor; that he was rendered entirely helpless by the accident; that he was neglected for more than two days before his wounds were dressed; and that he suffered unnecessarily in mind and body from his injury. The damages are seemingly heavy, but, in view of the facts of the case, we do not think they are so excessive as to justify a renewal. Therefore, we cannot say that the jury were influenced

by passion or prejudice in assessing the damages at the amount they did. We think, therefore, the judgment should be affirmed.

Judgment affirmed.

UNION PACIFIC RAILROAD COMPANY v. ERICKSON.

1894. Supreme Court of Nebraska. 41 Neb. 1.

Irvine, C.—Erickson was employed by the railroad company as a section hand and was engaged in his work repairing the road-bed of the railroad near Fremont, when a fast passenger train approached and he stepped aside to let it pass. As the train passed him a large piece of coal fell from the tender of the locomotive, struck the ground near him and broke into smaller pieces, one of which flew towards him, striking him and causing a fracture of the leg. He brought this action against the railroad company, alleging as negligence that the piece of coal had been negligently allowed to fall from the tender while the train was running at a high rate of speed; that the coal had been negligently loaded and negligently permitted to remain on the tender in a position rendering it liable to fall and to be cast off by the motion of the train. The railway company answered, among other things denying any negligence upon its part and alleging contributory negligence on the part of Erickson. There was a verdict and judgment for Erickson for $1,625.[1] * * *

The next proposition is that Erickson was a fellow-servant of whoever was guilty of negligence, and that the company is, therefore, not liable. Upon this subject elaborate briefs have been filed upon either side reviewing nearly all the American authorities. We shall not here undertake such a review. We are aware of the hopeless conflict existing. In fact a study of the question must convince any one that shortly after the introduction of railways the law entered upon a slow but marked period of transition upon the subject of fellow-servants. No definite result has yet been reached. Probably the leading case, both in America and in England, applying the doctrine of fellow-servants to all the employes of a common master, is that of Farwell v. Boston & W. R. Co., 4 Met. (Mass.) 49. All the cases holding that broad doctrine seem to be based directly or indirectly upon the authority or the reasoning of Chief Justice Shaw in that case. It was decided in 1842, before the railway system of the country was developed, before the existence of other large corporations employing vast numbers of men engaged in the pursuit of one general object, but performing different functions and engaged in many distinct departments. This state of affairs was then just

[1] A portion of the opinion is omitted.

or passion or prejudice in assessing the damages in the manner they did. We think there was no judgment which we should reverse.

Judgment affirmed.

UNION PACIFIC RAILWAY COMPANY v. ERICKSON.

(May [illegible], Supreme Court of [illegible].)

[illegible] C— [illegible] employed by the railway company as a section hand and was [illegible] the track repairing the road-bed of the railway. The [illegible] a foot passenger train approached and he stepped aside [illegible] as the train passed him a large piece [illegible] the center of the track [illegible] ground near [illegible] two smaller pieces, one of which [illegible] and injuring a [illegible] of the leg. He [illegible] company, alleging as negligence [illegible] was improperly allowed to fall from [illegible] at a high rate of speed; that [illegible] and negligently permitted to remain [illegible] rendering it liable to fall and to be [illegible]. The railway company answered, [illegible] any negligence [illegible] part and alleging [illegible] on the part of Erickson. There was a verdict for plaintiff for $7,625,[1] [illegible]

The case presents to this Court no [illegible] of whatever weight [illegible] importance, and that the company is therefore not [illegible]. Elaborate briefs have been filed upon other points, examining nearly all the American authorities. We shall not here [illegible] such a review. We see twelve of the hopeless conflict [illegible] in many fields of the law must convince any one that [illegible] upon the [illegible] it follows the law [illegible] upon a point [illegible] to [illegible] upon the subject of fellow-servants. No definite result [illegible] reached. Probably the leading case [illegible] in America as in England, applying the doctrine of fellow-servants to all the employés of a common master, is that of Farwell v. Boston & W. R. Co., 4 Met. (Mass.) 49. All the cases holding [illegible] bear directly or indirectly upon the [illegible] or the modifying of Chief Justice Shaw in that case. It was decided in that [illegible] railway system of the country was developed, before the existence of other large corporations employing [illegible] and engaged in the pursuit of one general object [illegible] and engaged in many [illegible]. The state of affairs was then just

[1] A portion of the opinion is omitted.

arising, and the vast change of conditions in the relations of master and servant was only then beginning to appear. The extent of that change and the consequences of applying old rules to new conditions could not then be foreseen. In that case, as in all others upon the subject, the reasons for the rule exempting masters from liability to servants for injuries produced by the negligence of their fellow-servants are stated as twofold: First, that such injuries must be presumed to be within the contemplation of the parties when they made their contract; and second, that public policy requires the enforcement of such a rule, upon the theory that by enforcing it each servant is made closely observant of the acts of his fellow-servants, and that the scrutiny of one another naturally tends to efficiency and care. The first reason given, where the rule is sought to be applied without discrimination to all servants of a common master, has already been completely set aside and disregarded, even by those courts in America most inclined to conservatism upon the subject. It is everywhere conceded that inasmuch as a corporation can only act through agents and all agents are servants, the logical application of the rule would discharge a corporation entirely from liability to its servants, and this gives rise to a corollary that where the negligence is that of a vice-principal whose acts must be taken as those of the master, the rule does not apply. The recognition of this exception was necessary to preserve another rule, that while a servant assumes the dangers incident to his employment, he does not assume dangers caused by the negligence of his master. There is as much reason for holding that a servant in entering an employment contracts with a view to possible negligence of the master as to hold that he contracts with a view to possible negligence of the man who works beside him and upon the same footing. To illustrate by reference to railways, which probably afford as great a variety of grades in employment as any occupation. Can it be logically said that a section man in the matters within the scope of his employment is less liable to err than a conductor, superintendent, or general manager with reference to his own duties? To the writer's mind, when the first distinction was drawn between grades of servants, the force of the general rule, so far as it was based upon contract, was destroyed. As to the second reason,—that founded upon public policy,—there is much force in the observation of Mr. Justice Field in Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 377: "It may be doubted whether the exemption has the effect thus claimed for it. We have never known parties more willing to subject themselves to dangers of life or limb because, if losing the one, or suffering in the other, damages could be recovered by their representatives or themselves for their loss or injury. The dread of personal injury has always proved sufficient to bring into exercise the vigilance and activity of the servant." Still we concede that there may be some force to the rule so far as grounded upon public policy and confined to servants who are, in the language

of the Supreme Court of Illinois, "consociated by means of their daily duties or co-operating in the same department of duty or the same line of employment." (Chicago & N. W. R. Co. v. Moranda, 93 Ill. 316). Beyond this line we can see no force in it. When the authorities are examined it is found that they range themselves in two general classes, those following the opinion of Chief Justice Shaw and those distinguishing between grades of employment, and employes in distinct departments of service. The principal objection urged to the latter class is that by adopting such distinctions the courts overthrow a general rule of easy application and adopt one not susceptible of precise application and uncertain in its results. Possibly this objection is well taken. If so, we can only say that it accords with the general spirit of the common law. Perhaps the main distinction between the civil law and the common law is that the civil law is based upon well-defined logical rules readily susceptible of ascertainment, while the common law is founded upon broader general principles, to be applied to the diversity of human affairs in such a manner as to favor individual liberty and to conform themselves to changed conditions. When the law of fellow-servants was first announced business enterprises were comparatively small and simple. The servants of one master were not numerous. They were all engaged in the pursuit of a simple and common undertaking. Now, things have changed. Large enterprises are conducted by persons or by corporations employing vast numbers of servants divided into classes, each pursuing a different portion of the work, and each practically independent of the other. The old reasons do not apply to the new conditions. We are not prepared in this case to propose any set rule for always determining when two employes are fellow-servants within the meaning of the law and when they are not, nor are we required for present purposes so to do. Erickson was a section man. He was employed with several others to keep the road-bed and the track in repair. The fireman was employed to fire the engine and perform certain duties in connection with the operation of trains. Some one was employed at Grand Island to load the tenders with coal. With either the fireman or this third person Erickson had nothing in common, except that he drew his pay from a common source, and that in a broad sense they were all carrying out parts of a vast transportation business. Erickson had no control over either of the others, no opportunities of judging their competency, no supervision of their specific acts, and only by adopting the broadest rule as announced by Chief Justice Shaw could we hold them to be fellow-servants. This rule we are not prepared to adopt. We hold on the contrary that employment in the service of a common master is not alone sufficient to constitute two men fellow-servants within the rule exempting the master from liability to one for injuries caused by the negligence of the other, and that to make the rule applicable there must be some consociation in the same de-

partment of duty or line of employment. For the purposes of this case we are content to follow the opinion of Mr. Justice Miller in Garrahy v. Kansas City, St. J. & C. B. R. Co., 25 Fed. Rep. 258, where, in the light of quite recent decisions and of the mature judgment of the supreme court of the United States in Chicago, M. & St. P. R. Co. v. Ross, *supra,* he held that persons occupying such relations were not fellow-servants within the meaning of the rule.

The other errors discussed in the briefs relate to the giving and refusal of instructions. If we are right in the conclusions reached on the branches of the case already discussed, there was no error in the instructions, as those given and refused, so far as they are complained of, simply relate to those questions.[2]

Judgment affirmed.

DANA v. BLACKBURN.

1906. Court of Appeals of Kentucky. 28 Ky. L. 695.

Settle, J.—This is an appeal from a judgment of the Campbell circuit court, entered upon the verdict of a jury, whereby appellee recovered of appellant $750 in damages for personal injuries received while engaged in its service as a shoveler of coal.

Appellant, a corporation, owns and operates a coal elevator on the Licking river in the city of Newport. The coal it handles is carried to its elevator in barges which are moored to a float and the float to the bank at the foot of a double track tramway which connects the float with an engine house and coal sheds on an elevated point overlooking the river. The coal is loaded from the barge in cars standing on the float, which are run up one of the tracks of the tramway to the coal sheds above, and when emptied of coal are returned upon the other track of the tramway to the float below. The cars are moved up and down by means of a wire cable which passes over a drum operated by a steam engine, the drum and engine being situated in the engine house at the top of the tramway.

On the float is a hopper supported by upright posts. By the use of a steam digger coal may be dumped into the hopper, through which it runs into the cars when placed beneath the hopper to receive it. When the steam digger is not in use the coal is thrown by appellant's shovelers from the barge into the cars on the float with shovels, and such was the manner of loading the coal on the cars

[2] Cases holding the "different department" rule are collected in 26 Cyc. 1342.

when appellee received the injuries complained of. The shovelers were paid for their work by appellant according to the number of cars loaded by them respectively. A shoveler and truckman were assigned to each car, it being the duty of the truckman to aid the shoveler in getting the empty car to the place on the float where it could be loaded by the shoveler from the barge, and the further duty of the two after it was loaded, the shoveler by pushing and the truckman by pulling it, to move and adjust the car to the track of the tramway, and when the loaded car was adjusted to the track upon which it ascends to the coal sheds, it was the duty of the shoveler who loaded it to attach it to the wire cable by dropping the ring at the end of the cable over the hook, or "gooseneck," on the end of the car, after which the car would by the action of the engine and drum in pulling the cable be drawn to the unloading place above.

Although several employes of appellant were present when appellee was injured, some of whom were introduced as witnesses, none of them saw or could tell how it was done. The only witness on that point was appellee himself, and his testimony is quite confused and indefinite.

When questioned by his counsel as to the manner of receiving his injuries, he said: "Well, there was a certain car after dinner, and when I was taking it down to the run, Mr. Elam Grizzell—I think that is his name—which are the river boss was taking mud off the track and I hollered to him to get out so I could pull the cable wire rope. After he had gotten out why I taken hold of the hook and swung to put it over the gooseneck, and as I did why I sort of slipped and throwed my hand up against the car. At that time I looked down the car and was going, I struggled to get aside of it and found myself I was being mashed and that was the last I knowed of."

Upon being asked if he did not slip before he was caught by the car, appellee said: "When I was feeling for the cable as I went to hook it, I slipped and got against the car; that is the last I remember of it till I was being mashed."

But taking appellee's testimony as a whole, and giving it a meaning most favorable to him, it was in substance that after loading a car, he was assisted by the truckman to get in position for its ascent to the coal shed and had just attached it to the cable when, without notice to him, it was started up the tramway, observing which he tried to get out of its way, but in doing so slipped and fell, which occasioned his being caught between the car and a post of the hopper, whereby his body was crushed, several of his ribs broken, and other injuries of a serious nature sustained by him. His testimony fully establishes the fact that it was his duty to attach the cable to the car and that he had so attached it before he was injured. Indeed, the latter fact cannot be disputed, for the car could not be moved until it was so attached.

It is appellee's contention that he was injured by the negligence of appellant's engineer, that the latter was his superior in authority, and that the negligence consisted in the moving of the car by which he was injured without notice to him and before he could reach a place of safety after attaching the cable to it. His own testimony was that he gave no signal to the engineer to start the car, and that as in attaching the cable to the car and when injured, he was so situated that he could not see the truckman, or be seen by him, he could not tell whether the car was moved by a signal from the truckman or not. Appellee also testified, in which he was corroborated by one other witness, that the car was sometimes started by the engineer without a signal, for when looking from the window of the engine room out on the tramway and float, as he often did, he could tell when the cable was attached to the car by its taut condition, and when in such condition he knew the car could be moved; therefore a signal was unnecessary; but that the car was usually started by a signal from the truckman to the engineer. If the engineer was not at the window, or in sight, the signal was given by a halloo from the truckman.

In testifying, appellee would not undertake to say, and did not know, whether or not the engineer was at the window of the engine house when he attached the cable to the car, and no other witness testified that he was at the window at that time. In brief, there was no testimony that tended to prove whether the car was started with or without a signal. The only testimony as to the moving of the car was that of appellee, and though it be admitted that it was started without notice to him, and before he was ready for it to start, and that some one was guilty of negligence in thus starting it, the identity of the negligent servant is undisclosed by the evidence. It will not be sufficient to say that appellee was injured either by the negligence of the engineer or truckman. Manifestly, the truckman associated with appellee in his work was his fellow-servant, both worked under the same foreman and in the same department, neither having the right to command or control the other. The fact that the truckman was accustomed to give signals for the starting of the cars did not make him appellee's superior. In I. C. R. R. Co. v. Stewart, 23 Ky. L. 637, it was held that a switchman could not recover of the railroad company because of the negligence of another switchman in giving improper signals, as they were fellow-servants. Indeed, it seems to be conceded by counsel for appellee that he and the truckman were fellow-servants, so even if it be admitted that the engineer was appellee's superior in appellant's service, as contended by the former, as at most the testimony only tends to prove that appellee's injuries may have resulted from the negligence of the engineer or truckman, and the inference that they resulted from the negligence of the truckman, a fellow-servant, for which appellant is not liable, being just as strong as that they re-

sulted from the negligence of the engineer, a recovery was unauthorized. The burden was upon appellee to prove that his injuries were caused by the negligence of a servant of appellant superior to himself in authority.

The mere fact that he was injured while in appellant's service is not evidence that he was injured by the negligence of a superior, or even of a fellow-servant. Nor is such negligence to be presumed, and as appellant, in the absence of proof of negligence, is not required to account for appellee's injuries, the fact that it did not upon the trial attempt to do so, gave no support to appellee's contention. Louisville Gas. Co. v. Kaufman-Straus & Co., 105 Ky. 131; Hughes v. R. R. Co., 91 Ky. 526; Wintuski's Adm'r v. L. & N. R. R. Co., 14 Ky. L. 579.

While in this state the common-law doctrine of *respondeat superior* applies where a brakeman on a railroad train is injured by gross negligence upon the part of the engineer of the same train, we have been referred to no case which extends this doctrine to an injury to a servant caused by the negligence of a stationary engineer employed by the same master and engaged in the same service with the injured servant. No evidence was offered in the case at bar which tended to show that the elevator engineer was a representative of the master in respect to other workmen in the master's service engaged in the work of transferring coal from barges in the river to coal sheds on the hill above. In that work, appellee, the engineer, and all other workmen about the barges and elevators, were directed and controlled by a superintendent in appellant's employ known as the "river boss," but, according to the proof of the engineer, did not control or command appellee or the other workmen about him. In a certain sense, appellee and the truckman had as much control over the cars as the engineer; they filled and moved them on the float to the point where they were attached to the cable, and when that was done the engineer controlled their movements until they reached the coal sheds.

The engineer was, therefore, a fellow-servant of appellee, and if the latter was injured by his negligence—of which there was no proof—such injury was incidental to the work in which both were engaged, and one of the ordinary risks pertaining thereto. Sherman & Redfield on Negligence, § 109; Fort Hill Stone Co. v. Orms' Adm'r, 84 Ky. 182; Doyle v. Swift Iron & Steel Works, 5 Ky. L. 59.

We do not think the evidence shows that appellee and the engineer were employes working in different departments of the same service, as contended by counsel. There are numerous cases, some of them decided by this court, holding that employes working in a distinct and independent department, although in the same line of service, as engineers operating different trains, are co-agents, and not fellow-servants. Volz v. C. &. O. Ry. Co., 95 Ky. 188; L. & N. R. R. Co. v. Edmonds, 23 Ky. L. 1049.

In discussing the different department doctrine, McKinney on Fellow Servants, p. 168, § 74, says: "The different department limitation or doctrine of consociation, seems to be founded entirely on the fact that servants in different departments of a large industrial enterprise are unable to exercise any influence upon one another on the encouragement of caution, and the supposed reasons for the rule as to fellow-servants failing, the courts refuse to apply it." * * *

Further on in the same section (74), page 173, the author presents additional reasons for the doctrine in question as follows: "Unless either their duties are such that they usually bring about personal association between such servants, or unless they are actually co-operating at the time of the injury in the business in hand, or in the same line of employment, they have generally no power to incite each other to caution by counsel, exhortation or example, or by reporting delinquencies to the master."

The principles on which the separate department rule rests do not apply to this case. Appellant's plant is a small one, and its operatives few in number. They were at the time appellee received his injuries so closely associated in work and the area of operations so circumscribed that but one superintendent over all was required. Each employe had an opportunity to observe and communicate with his fellow-servants, to caution them by counsel, incite them by example, or report their delinquencies to the master. Under such circumstances, all save the superintendent were on an equality, and fellow-servants in appellant's employ. We can find no grounds for holding appellant responsible in damages for appellee's injuries, and in our opinion the trial court should have granted the peremptory instruction asked by appellant's counsel at the conclusion of appellee's testimony.[1] * * *

For the reasons indicated the judgment is reversed and cause remanded for a new trial and further proceedings consistent with the opinion.

Whole court sitting.

Judge Nunn dissents from so much of the foregoing opinion as holds the engineer a fellow-servant of the appellee.[2]

[1] A portion of the opinion is omitted.

[2] "The practical difficulty in trying to enforce the department doctrine is that it is nowhere stated of what the departments shall be composed. The term or name is employed as expressive of a class, but there has been no attempt to classify. The result is contrary judgments upon the same facts, an irreconcilable contrariety of opinion, with a natural and to-be-expected confusion in the law, with no better or more satisfactory results to either the master or servant than were attained before the doctrine was announced." Marshall, J., in Grattis v. Kansas City, etc., R. R., 153 Mo. 380, 395.

INDIANAPOLIS & GREENFIELD RAPID TRANSIT COMPANY v. FOREMAN.

1903. Supreme Court of Indiana. 162 Ind. 85.

Monks, J.—Appellee brought this action against appellant and the Kirkpatrick Construction Company, a corporation, to recover for a personal injury alleged to have been caused by the negligence of said corporations. The defendants jointly filed a demurrer to each paragraph of the amended complaint, and each defendant filed a separate demurrer to each paragraph of the complaint. These demurrers, which challenged each paragraph of the complaint for want of facts, were overruled by the court, to which ruling the defendants "jointly and separately excepted." A trial of said cause resulted in a general verdict against appellee as to the Kirkpatrick Company and in favor of appellee against appellant. Appellant filed a motion for a new trial, which was overruled, and judgment was rendered on the verdict in favor of appellee.

The errors assigned call in question the action of the court in overruling (1) the joint demurrer of appellant and said construction company to the amended complaint, (2) the separate demurrer of appellant to each paragraph of the amended complaint, and (3) appellant's motion for a new trial. The amended complaint is also challenged by an assignment that the same "does not state facts sufficient to constitute a cause of action."

Appellee insists that appellant's assignment of errors predicated upon the exception taken by appellant to the rulings on the demurrers to each paragraph of the complaint presents no question as to the sufficiency of the paragraphs thereof, citing City of South Bend v. Turner, 156 Ind. 418, 421, 54 L. R. A. 396, 83 Am. St. 200. It will be observed that in the case cited the exception was joint, while in this case the defendants "jointly and separately excepted." It is clear, therefore, that the case cited is not in point here.

The first paragraph of the amended complaint proceeds upon a common-law liability. Appellant was, on May 27, 1901, "a corporation owning and operating an interurban street railway extending from Irvington to Greenfield, in this state, and was a common carrier of passengers for hire. On said day appellee was an employe of appellant as a common laborer, and was engaged with divers others in constructing a spur from appellant's track to Spring Lake, a distance of three-fourths of a mile. Appellant had in use on said day a car known as a work car, which had been and was used in carrying its employes to divers points along said road where they were engaged and employed by appellant in building, maintaining, and repairing its said line of road. After said day's work had been finished, at about 6:30 p. m., appellee, with divers other employes of appellant, entered said work car on said spur for the purpose of

TEXAS & N. O. R. CO. v. KIRKPATRICK TRANSIT COMPANY et al.

(No. 3,[illegible] Commission of Appeals, Section B. [illegible])

Suit by [illegible] against the Texas & New Orleans Railroad Company and the Kirkpatrick Transit Company, a corporation, to recover for a personal injury alleged to have been caused by the negligence of said corporations. The [illegible] answered to each paragraph of the plaintiff's complaint, and each defendant filed a separate demurrer to the complaint, [illegible] the exceptions. These demurrers, which challenged each paragraph of the complaint for want of facts, were sustained by the court, to which ruling the defendants [illegible] and [illegible] excepted. A trial on said cause resulted in a general verdict against appellants in the Kirkpatrick Company case, and in favor of the [illegible] appellant filed a motion for a new trial, which was overruled, and judgment was rendered [illegible] case of appellee.

The [illegible] question the action of the court in [illegible] sustaining the demurrers of appellees and in construction [illegible] demurrer, (2) the [illegible] demurrer of appellee [illegible] of the amended complaint, and (3) appellee [illegible] trial. The amended complaint is also challenged as [illegible] that the same does not state facts sufficient to constitute a cause of action.

[illegible] appellant's assignments of error predicated upon the [illegible] in addition to the rulings on the demurrers to [illegible] complaint presents no question as to the sufficiency of the [illegible] Texas City to South Bend v. Turner, 156 [illegible] 54 L. R. A. [illegible] 80 Am. St. 866. It will be observed [illegible] that case cited the [illegible] joint, while in this case the [illegible] "jointly and severally excepted." It is clear, therefore, that the case cited is not in point here.

The first paragraph of the amended complaint proceeds upon a common-law liability. Appellant was, at [illegible] of age, "a corporation owning and operating an [illegible] railway extending from Brandon to Corbindale, in the State of Texas, as a common carrier of passengers for hire." On the [illegible] appellee was an employé of appellant as a common laborer, and was engaged with [illegible] in constructing a [illegible] from Brandon to Spring Lake, a distance of three-fourths of a mile. Appellant had in use on said [illegible] a car known as a work car, [illegible] and was used in carrying the employés to divers points along said road where they were employed and employed by appellant in building, maintaining, and repairing [illegible] said line of road. After the day's work had been finished, at about [illegible] p. m., appellee and divers other employés of appellant, carried said work car on said spur for the purpose of

being carried to Greenfield, where he resided. While he was in said car, and the same was standing on a switch of appellant's road, one of the appellant's passenger-cars in charge of its employes approached said switch from the west at a high and dangerous rate of speed, to wit, thirty miles per hour, and ran into and upon said switch and collided with said work car and injured appellee." In addition to the averments in the first paragraph of the amended complaint showing the above facts, there are other allegations showing that the collision and consequent injury of appellee were caused by the negligence and carelessness of appellant's employes in charge of said passenger-car in not obeying the rules of appellant.

It is also alleged in said first paragraph that "the work in which appellee was engaged was common labor upon the tracks of appellant, and had no connection with, nor was the same in any manner incident to or a part of the work or employment of said motorman or servants in charge of the passenger-car; nor were the squad of laborers with whom said appellee was working as aforesaid, and who were with him in said work-car, in any manner connected or associated with the said servants of appellant in charge of said work-car or said passenger-car which collided with it; that appellee had no charge of said work car or the operation thereof, but was simply a passenger thereon at the time of the accident." Appellee says that this "paragraph of the complaint proceeds upon a common-law liability," and that the same is sufficient, because it is alleged that his injury was occasioned by the negligence of other servants of the company, whose duties were not common nor in the same department with those of the appellee, citing Fitzpatrick v. New Albany, etc., R. Co., 7 Ind. 436.

It was held in the case cited and in Gillenwater v. Madison, etc., R. Co., 5 Ind. 339, 61 Am. Dec. 101, that a railroad company is liable to an employe for an injury occasioned by the negligence of other employes of the company where the duties of the latter, in connection with which the injury happens, are not common or in the same department with those of the injured servant. Those cases, however, were overruled on this point in Columbus, etc., R. Co. v. Arnold, 31 Ind. 174, 183, 99 Am. Dec. 615, where it was said concerning said rule: "But this limitation of the exemption of the company from liability in such cases is not recognized in any of the subsequent cases; and it is now settled in this state, that the employer is not liable for an injury to one employe, occasioned by the negligence of another engaged in the same general undertaking. Ohio, etc., R. Co. v. Tindall, 13 Ind. 366; Wilson v. Madison, etc., R. Co., 18 Ind. 226; Slattery v. Toledo, etc., R. Co., 23 Ind. 81; Ohio, etc., R. Co. v. Hammersley, 28 Ind. 371. In Slattery v. Toledo, etc., R. Co., *supra*, Worden, J., quotes, with approbation, from the decision in Wright v. New York Cent. R. Co., 25 N. Y. 562, as follows: 'Neither is it necessary, in order to bring a case

within the general rule of exemption, that the servants, the one that suffers and the one that caused the injury, should be at the time engaged in the same operation or particular work. It is enough that they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties and services tending to accomplish the same general purposes, as in maintaining and operating a railroad, operating a factory, working a mine, or erecting a building. The question is whether they are under the same general control.' To the same effect is the case of Manville v. Cleveland, etc., R. Co., 11 Ohio St. 417, where it said, that 'those employed in facilitating the running of the trains, by ballasting the track, removing obstructions, and those employed at stations, attending to switches, and other duties of a like nature upon the road, as well as those upon the trains, operating, may all be well regarded as fellow-servants in the common service.' "

In Gormley v. Ohio, etc., R. Co., 72 Ind. 31, a laborer, whose duty was to assist in repairing the track, etc., while being carried to his work on a hand-car, was killed by a collision with a freight train. His death was occasioned by the negligence of the engineer in charge of the engine and said train. The court's attention was called to the cases of Gillenwater v. Madison, etc., R. Co., *supra,* and Fitzpatrick v. New Albany, etc., R. Co., *supra,* and on page 33 it was said: "The cases cited by counsel were not overlooked, but were referred to and explained or disapproved in the later cases. Slattery v. Toledo, etc., R. Co., 23 Ind. 81; Columbus, etc., R. Co. v. Arnold, 31 Ind. 174; Wilson v. Madison, etc., R. Co., 18 Ind. 226; Pittsburgh, etc., R. Co. v. Ruby, 38 Ind. 294; Sullivan v. Toledo, etc., R. Co., 58 Ind. 26. These later cases are certainly not consistent with the ground on which it is sought to have a right of recovery in the appellant. If a hardship results from the application of the rule that an employer is not liable to one employe for an injury caused by another employe engaged in the same general undertaking, it is more fitting that the legislature be invoked to give a remedy, than that this court should undertake to introduce doubtful exceptions to a rule so clearly established." In Evansville, etc., R. Co. v. Barnes, 137 Ind. 306, 310, the rule as stated in Columbus, etc., R. Co. v. Arnold, *supra,* is quoted with approval. The following cases are to the same effect: Thacker v. Chicago, etc., R. Co., 159 Ind. 82, 85, 59 L. R. A. 792, and cases cited; Thompson v. Citizens' St. R. Co., 152 Ind. 461, 469, and cases cited; Justice v. Pennsylvania Co., 130 Ind. 321; Spencer v. Ohio, etc., R. Co., 130 Ind. 181, 184, and cases cited; Clarke v. Pennsylvania Co., 132 Ind. 199, 17 L. R. A. 811, and cases cited; Capper v. Louisville, etc., R. Co., 103 Ind. 305; Indiana, etc., R. Co. v. Dailey, 110 Ind. 75, 79, 80, and cases cited; Sullivan v. Toledo, etc., R. Co., *supra;* Woollen Trial Proc., §§ 1350, 1351; Beach, Contrib. Neg., § 331. It is clear under the cases cited that appellee, an employe of appellant, engaged in com-

mon labor upon its track, was a fellow-servant with those in charge of the passenger-car.

It is a general rule in this state that employes, while being transported to and from their work on the cars of trains of their employers, are fellow-servants of those engaged in the same general undertaking, and if injured, while being so carried, by the negligence of a fellow-servant, the employer is not liable therefor. Bailey Masters' Liability 283, 360, 361, and cases cited. Ohio, etc., R. Co. v. Hammersley, 28 Ind. 371; Wilson v. Madison, etc., R. Co., *supra,* and cases cited; Capper v. Louisville, etc., R. Co., *supra,* and cases cited; Ohio, etc., R. Co. v. Tindall, 13 Ind. 366, 369, 74 Am. Dec. 259, and cases cited; Gormley v. Ohio, etc., R. Co., *supra*; Bowles v. Indiana R. Co., 27 Ind. App. 672, 675, and cases cited; Ewald v. Chicago City R. Co., 70 Wis. 420, 36 N. W. 12, 5 Am. St. 178; Gilman v. Eastern R. Corp., 10 Allen 233, 87 Am. Dec. 635; Gillshannon v. Stony Brook R. Corp., 10 Cush. 228; Ryan v. Cumberland Valley R. Co., 23 Pa. St. 384; Vick v. New York, etc., R. Co., 95 N. Y. 267, 47 Am. Rep. 36.

The allegation that the work appellee was engaged in doing had no connection with, nor was in any way connected with or incident to or a part of, the work or employment of the motorman or servants in charge of the passenger-car, and the allegation that he was simply a passenger on the work-car, and the allegation that appellant owed him a duty, and was bound to carry him safely, are mere conclusions of the pleader, and are not admitted by the demurrer, and cannot control the special facts alleged, which show that he was a fellow-servant of those in charge of the passenger-car. Woollen Trial Proc., § 1037.

It is true that if an employe is injured by the negligence of a fellow-servant who is incompetent, and this incompetency is the proximate cause of the injury, the employer is liable therefor if he knew, or could by the exercise of ordinary care have known, of such incompetency, and the injured employe was not guilty of any negligence contributing to his injury, and did not know and could not have known of such incompetency by the exercise of ordinary care. For if an injured employe has knowledge of the incompetency of his fellow-servant by whose negligence he is injured, and enters the service with such knowledge, or continues therein after he obtains, or could by the exercise of ordinary care have obtained, such knowledge, he assumes the risks incident to such incompetency. Lake Shore, etc., R. Co. v. Stupak, 108 Ind. 1, 5, 6, and cases cited; Louisville, etc., R. Co. v. Sandford, 117 Ind. 265-269, and cases cited; Indianapolis, etc., R. Co. v. Watson, 114 Ind. 20, 25, 27, 5 Am. St. 578, and cases cited; Indiana, etc., R. Co. v. Dailey, *supra;* Louisville, etc., R. Co. v. Kemper, 147 Ind. 561, 565-567, and cases cited; Kroy v. Chicago, etc., R. Co., 32 Iowa 357; Woollen Trial Proc., §§ 1347, 1348, 1352. No such facts were alleged in said paragraph.

It follows that the court erred in overruling the demurrer to the first paragraph of the amended complaint.[1] * * *[2]

Judgment reversed.

YEOMANS v. CONTRA COSTA STEAM NAVIGATION COMPANY.

1872. Supreme Court of California. 44 Cal. 71.

Appeal from the district court of the twelfth judicial district, city and county of San Francisco.

The following is the eighth instruction referred to in the opinion: "If you believe from the evidence that an explosion of defendants' boiler took place at their depot on the 27th day of August, 1866, and the said plaintiff, while standing on the platform of defendants, in the depot where passengers usually went, in getting on and off the cars, that the plaintiff, while in that position, was then intending to take passage on said cars, and about to step into the baggage car, where he had often and usually ridden; that there was no regulation of defendants against his going in the baggage car, and the plaintiff, while in this position, was, without his fault, injured by an explosion of defendants' boiler, then the plaintiff has made out a *prima facie* case, and is entitled to recover, unless the defendants have shown that the explosion of the boiler was the result of inevitable casualty, or from some cause which attentive care could not prevent."

Niles, J.—The plaintiff recovered a judgment for damages for injuries received from the explosion of a boiler upon a locomotive owned by the defendants.

The appeal is taken from the judgment and from the order overruling defendants' motion for a new trial.

At the time of the injury the defendants were common carriers of freight and passengers between San Francisco and Petaluma, using steamboats between San Francisco and Rudesel's Landing, and between the latter and Petaluma a small locomotive and train of cars. There was no separate charge for passage; it was all one line and was under one management, the captain of the steamboat acting as conductor on the cars.

At the date of the accident the plaintiff was keeping a bar upon the steamboat under an agreement with the defendants, he paying to them the sum of two hundred dollars per month for the privilege and use of the bar, with the use of a stateroom and such meals as he

[1] A portion of the opinion is omitted.

[2] Cases repudiating the "different department" rule are collected in 26 Cyc. 1344.

The court in Whaalan v. R. R., 8 Ohio St. 249, declined either to reject or adopt the "different department" rule, saying that each case must be decided upon its particular facts.

It follows that the court erred in overruling the demurrer to the first paragraph of the complaint. * * *

Judgment reversed.

[illegible] v. [illegible] COSTA ATTIC PRESERVATION COMPANY.

[illegible] Court of Calif[illegible] [illegible] 97

[illegible] from the [illegible] of the [illegible] Judicial District, City and County of [illegible].

The following is the [illegible] referred to in the opinion:

"It [illegible] that on the 27th day of August, 1896, and for [illegible] preceding, on the premises of defendants, in the [illegible] [illegible] went in, going on and off the car. [illegible] their passage, the [illegible] intending to take passage [illegible] and about to step into the baggage car, [illegible] [illegible] that there was no regulation [illegible] baggage [illegible] the plaintiff, [illegible] by [illegible], to leave [illegible] the plaintiff [illegible] [illegible] to recover, unless the defendants have shown [illegible] was the result of unavoidable casualty, [illegible] [illegible] carrying care and prudence."

Nunez [illegible] recovered a judgment for damages for personal injuries [illegible] of a trailer upon a [illegible] operated by the [illegible].

The [illegible] from the judgment and from the order overruling [illegible].

[illegible] are [illegible] carriers of [illegible] and passengers [illegible] San Francisco and Petaluma, using steamboats between [illegible] and Petaluma, and between the latter and [illegible] a small locomotive and train of cars. There was no [illegible] for passage [illegible] one and the same ticket [illegible] the [illegible] of the steamboat going at [illegible] on the cars.

At the [illegible] the plaintiff was keeping a bar upon the steamboat under [illegible] with the [illegible] by paying to [illegible] the sum of [illegible] dollars and [illegible] the privilege and use of the bar, with the use of a [illegible] such meals as he

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[illegible] motion in the [illegible] opinion.

Cases [illegible] [illegible] are collected in 46 Cyc. 1404.

The case of [illegible] 6 L. R. A. (N. S.) 1[illegible] refers to cases to show the different [illegible] rule where the [illegible] must be decided upon [illegible] facts.

might desire upon the boat, and receiving to his own use the profits of all sales of liquors, etc. In addition to his business as barkeeper he acted as express messenger under employment by Wells, Fargo & Co., and received from the express company for his services in that capacity fifty dollars per month. Wells, Fargo & Co. paid to the defendants a monthly rate for carrying their packages and messenger over the route.

The plaintiff resided at Petaluma, and as he was about to enter the cars at that place, intending to make the usual daily trip to San Francisco, the boiler of the locomotive, then in charge of the defendants' engineer, exploded and caused the personal injury for which the plaintiff recovered judgment in this action.

At the close of the testimony the court, at the request of the plaintiff, gave to the jury the following instructions:

"First—If the jury believe from the evidence that the defendants were engaged in the transportation of passengers from San Francisco to Petaluma, and from Petaluma to San Francisco, before and during the month of August, A. D. 1866; that during this same period of time the plaintiff rented at a monthly or other rental of defendants a bar on the steamer of the defendants, and traveled thereon to tend the same; that said steamer, during said period, ran on said route from San Francisco to a landing on the Petaluma Creek, from whence the passengers so transported were by defendants conveyed to the Town of Petaluma, by cars propelled by steam, and from the Town of Petaluma to said landing by means of said cars; that for said rental of said bar it was understood and agreed as part of the consideration for the rental agreed to be paid by the plaintiff to the defendants, that the plaintiff should be transported on said route by said cars and steamer, without other or further charge; that on the 27th day of August, 1866, the said plaintiff came to said cars at the depot thereof at Petaluma, for the purpose of going to said steamer, and by and on said steamer to San Francisco, in attendance of said bar; that he was standing in the depot on the platform of defendants, usually occupied by passengers who were departing or arriving by said cars, for the purpose of getting on said cars, when the boiler of the locomotive attached to said cars blew up, through the carelessness or negligence of the engineer of defendants, who was in charge of said locomotive, and the plaintiff was injured thereby (he, the plaintiff, not being guilty of any negligence contributing to his injury), the plaintiff is entitled to recover.

"Second—If the jury believe from the evidence that the defendants were engaged in the transportation of passengers from San Francisco to Petaluma, and from Petaluma to San Francisco, before and during the month of August, A. D. 1866; that during the same periods of time Wells, Fargo & Co. employed the plaintiff to carry their express matter between said places, and paid the defendants to transport said express matter for a certain sum of money per month;

and said plaintiff and said defendant entered upon said arrangement, and were engaged in the same during said period of time, and that it was understood and agreed between said defendants and Wells, Fargo & Co. that the plaintiff, as their messenger, should be transported with their said express matter from San Francisco to Petaluma, and from Petaluma to San Francisco, during said period of time; that the defendants made such transportation by cars propelled by steam, and a steamer; that said cars started from the town of Petaluma; that while thus engaged the plaintiff, during said period of time, came to said cars, at the depot thereof, for the purpose of going to San Francisco; that he was standing on the platform of said defendants, near said cars, for the purpose of stepping into a car of defendants (and that said platform was usually used by passengers departing or arriving by said cars), when the boiler of the locomotive attached to said cars exploded, through the negligence or carelessness of the engineer employed by the defendants, who was then in charge of said locomotive, and the plaintiff was injured thereby (the plaintiff not being guilty of any negligence which contributed to his injury), then the plaintiff is entitled to recover damages for such injury."

The defendants excepted to these instructions, and contend that the case is within the reason of the rule that an employer is not responsible to his employe for injuries resulting from the negligence, carelessness, or unskilfulness of a fellow employe engaged in the same general business.

The rule itself cannot be questioned. It has been settled by a uniform series of both English and American decisions. The question comes upon the application of the principle to the present case.

The reason usually given in the cases for the rule, as we have stated it, is that a servant, in bargaining with his employer is presumed to know the ordinary risks of the business in which he is to engage, and can obtain a compensation in accordance with the risk, or at his option decline the employment. Among the ordinary perils of the service are those arising from the carelessness or negligence of co-laborers, and they are presumed to be provided for in the bargain which he makes. He assumes the risk as a part of his contract of service. The duty of the employer in this regard extends no further than to the use of due care and prudence in the selection of competent servants in the several departments of the business. (Farwell v. Boston & Worcester Railroad Co., 4 Met. 49; Albro v. Agawam Canal Co., 6 Cush. 77; Ryan v. Cumberland Valley Railroad Co., 23 Pa. St. 385; Russell v. Hudson River Railroad Co., 17 N. Y. 137; Hard v. Vermont, etc., Railroad Co., 32 Vt. 477; Sher. & Red. on Neg., §§ 86, 88, 90, and cases cited.)

The doctrine of these cases is not based wholly or mainly upon the theory that the employe is presumed to know the nature of the risk.

In the case of Abraham v. Reynolds, 5 Hurlst. & Nor. 147, cited by the appellant, it was suggested by Chief Baron Pollock that the test in such cases was whether the party injured, knowing the risk, incurred it voluntarily; and, as an illustration of the principle, said that a guest at a house was in the same position as a servant, because he had the same means of judging the character of the house in which he was.

We do not think that the test suggested by the learned judge is sufficient. An ordinary passenger acquainted with the structure or management of steam engines might know that the boiler upon a steamboat or locomotive was unsafe, or might observe that the engineer was careless or incompetent, and yet be willing, from motives of necessity or interest, to encounter the risk of travel. Yet this knowledge upon his part would not absolve the carrier of passengers from liability for damages for injuries received by the passenger from the negligence of the engineer, or insufficiency of the boiler.

The co-laborer cannot recover in such a case, because he knowingly entered into a contract, from which the law implies an assumption by him of these very risks.

We do not think the present case comes within the letter or reason of the rule. As messenger for Wells, Fargo & Co., merely, it is not contended that the plaintiff would not have occupied the position of an ordinary passenger. As barkeeper, he was in no sense an employe of the defendants. He was a lessee, for a monthly rent, of an apartment upon their boat, which he occupied for purposes of trade. His transportation over the route was a part of the consideration for the monthly payment. The defendants had no interest in the receipts of his business, and could not hold him accountable for its proper conduct. The parties were in no sense members of the same establishment for one common purpose. The vending of liquors and cigars to passengers was no part of the business in which the transportation company were engaged. The case would have been the same if the plaintiff had leased an apartment upon the boat for any other species of trade. If a cigar vendor should rent and occupy, for the purposes of his trade, a corner of a merchant's store, and an explosion should occur through the negligence of the merchant's clerk, it would not be contended that the merchant would not be responsible in damages to the cigar vendor for personal injuries resulting from the accident. The fact that the place of trade was upon a steamboat can make no difference in the application of the principle.

Grave objections have been made to the rule which relieves a master from liability for damages incurred by the negligence of a fellow servant. While the rule is too firmly supported by authority to be overthrown, we are unwilling to extend it beyond the limits designated by the general line of decisions.

We think that the plaintiff in the hypothetical case stated in the instructions was entitled to the privileges and remedies of an ordinary passenger.

It follows, that the court did not err in giving these instructions, or in refusing those asked by the defendants in opposition to them.

There was no error in the eighth instruction, given at the request of the plaintiff. It premises that the jury must be satisfied from the evidence that the plaintiff, at the time the explosion occurred, was standing upon the platform, intending to take passage on the cars, and about to step into the car; and then directs the application of the well-settled principle that as between a passenger and a common carrier of passengers, the proof of the occurrence of an accident, without fault of the passenger, is *prima facie* proof of negligence on the part of the carrier. (Boyce v. Cal. Stage Co., 25 Cal. 467; Ficken v. Jones, 28 Cal. 627.)

It was a contested issue whether the plaintiff was or was not a passenger, and the jury were required substantially to find this issue in favor of the plaintiff, before applying the principle of law embodied in the instruction.

Third—The sixth instruction asked by the defendants was substantially given in the charge of the court, and a repetition of it could not benefit the defendants.

We see nothing in the other points made by the defendants which requires special notice. The record discloses no error which calls for a reversal.

Judgment and order affirmed.[1]

KANSAS PAC. RY. CO. v. SALMON.

1873. Supreme Court of Kansas. 11 Kan. 83.

Valentine, J.—This was an action brought by Margaret Salmon, administratrix of the estate of Daniel Salmon deceased, against the Kansas Pacific Railway Company, to recover damages for wrongfully causing the death of said Daniel Salmon. The issues were

[1] See particularly Murray v. Currie, L. R. 6 C. P. 24.

In Jones v. St. Louis, etc., Ry. Co., 125 Mo. 666, it was held that a porter on a Pullman car is not a fellow-servant of the engineer operating the train.

"I can well conceive that the general servant of A might, by working toward a common end along with the servants of B and submitting himself to the control and orders of B, become *pro hac vice* B's servant, in such sense as not only to disable him from recovering from B for injuries sustained through the fault of B's proper servants, but to exclude the liability of A for injury occasioned, by his fault, to B's own workmen." Lord Watson in Johnson v. Lindsay, L. R., 1891, App. Cas. 371, 382.

tried by a jury; and on the trial the parties submitted the following agreed statement of facts to the jury as evidence, to wit:

"1st. The plaintiff is the administratrix of the estate of Daniel Salmon, deceased, duly and legally appointed, as in the petition alleged. 2d.—At the time of the death of Daniel Salmon, he left surviving him, the plaintiff, Margaret Salmon, his widow, and two children of the said Margaret and the said Daniel, issue of their marriage. 3d.—The defendant is a corporation and common carrier, as alleged in the petition, and also of freight trains; and as such owned and operated the line of railroad alleged in the petition. 4th.—On the 13th of September, 1870, said Daniel Salmon was, and for a long time previous thereto had been in the employ of the defendant as locomotive engineer. The family of the said Salmon resided at Ellsworth, and the said Salmon was, by permission of the defendant, accustomed, on days when it was not his regular turn to run an engine, to return upon his route on defendant's trains to Ellsworth, a distance of twenty-three miles from Brookville, to stay with his family, instead of remaining at Brookville, which was the eastern end of his regular run as an engineer; and this was not forbidden by the foreman of engineers, his immediate superior, but was by the consent and permission of the defendant; but he was then subject to be ordered by defendant to take charge of any engine of defendant at any moment. And on the morning of the said 13th of September, having remained all night with his family at Ellsworth, he set out to ride to Brookville, as was his custom to do, upon the defendant's freight train (which did not carry passengers, and was by the defendant forbidden to do so, unless the facts herein stated constituted the deceased a passenger), to take his run; that is, to operate an engine from Brookville westward, according to his regular turn; and as such employe, by permission of the conductor in charge of the freight-train from Ellsworth to Brookville, being a freight train with a caboose car, in which laborers upon the line of the said railway, and other employes, had been and were accustomed to travel to their work on said road, with the assent and permission of defendant said Salmon got into the caboose car for the purpose of going to Brookville to resume his duties as such engineer at said point. He paid no fare, nor was he requested by the conductor to pay any fare, and was known to the conductor as an employe as aforesaid; and the said Salmon knew the usages of defendant respecting the prohibition of passengers upon freight trains. He was not actually employed in operating that train in any capacity, and such facts were known to the conductor of such train. On the road between Ellsworth and Brookville, in the state of Kansas, and while said Daniel Salmon was in the caboose car as aforesaid, the train was endeavoring to ascend a heavy grade, and being unable to do so, backed down the grade, and came in collision with another train belonging to said defendant, going in an opposite direction from the

way the aforesaid train was backing down. The trains so coming into collision, the car in which said Daniel Salmon was, was crushed without fault or negligence on his part, and was thrown from the track, and he mortally wounded thereby, from which mortal wound he died the succeeding day. That the injury received by him and from which he died was not occasioned by any neglect or fault on his part, other than may be legitimately inferred from the facts aforesaid."

There was some evidence introduced on the trial, but nothing that in the least affects or modifies the foregoing agreed statement of facts. The jury found a special verdict; and in their verdict they found the facts literally as agreed to in the foregoing statement, except that they omitted the following concluding words of the agreed statement of facts, to wit—"other than may be legitimately inferred from the facts aforesaid." The jury made some other findings, but it is scarcely necessary to notice them, for those that harmonize with the foregoing statement of facts raise no question of law not already raised by such agreed statement, and those that conflict with said agreed statement were found by the jury without any evidence to sustain them, and against the evidence. The main, and in fact the only question in this case is, whether the deceased was a *passenger*, or merely an *employe* of the defendant, while riding on the defendant's train.

If he was a passenger, the other facts would undoubtedly give the plaintiff the right to recover in this case; but if he was merely an employe, the plaintiff would not have any such right. The court, among other instructions, charged the jury as follows:

"I instruct you that the mere, naked, unexplained fact of a collision of two trains of cars, operated by the same railroad company, raises the presumption of negligence on the part of the company."

And the jury, in pursuance of this instruction, found as follows: "5th—The death of said Daniel Salmon was caused by the negligence of the defendant, without any fault of the said Daniel Salmon"—and upon this finding the court below rendered judgment for the plaintiff and against the defendant. All this would have been correct if the deceased had been a passenger; but it was certainly incorrect if the deceased was only an employe of the company. The said collision was the only proof of negligence on the part of the railroad company introduced on the trial. A collision always presumptively shows negligence, but whether negligence of the company, or negligence merely of some one or more of its officers, agents, or employes, is the important question in this case. As between the railroad company and a passenger, the negligence of any officer, agent, employe or servant of the company is the negligence of the company itself; but as between the railway company and one of its employes, the negligence of another employe, a co-employe, is not at all the negligence of the company. (Dow v. K. P. Ry. Co.,

8 Kan. 642.) Therefore while a collision presumptively proves negligence on the part of the company as between the company and a passenger, yet it never proves negligence on the part of the company as between the company and one of its employes. It is a general rule that one employe does not represent the principal any more than any other employe; and negligence between co-employes is not at all the negligence of the principal. This rule has its exceptions. As to railroad companies, the general manager, the general superintendent, the general officer for the employment or discharge of the other agents and servants of the railway company, or indeed any other general officer, would probably be the representative of the company, in fact the company, as between the company and all other persons, whether such persons were employes or not. But proof of a collision does not at all show negligence on the part of any one of these general officers. It tends more properly to show negligence on the part of the brakeman, the fireman, the engineer, the conductor, or some other inferior officer, agent or servant of the company, who has a more close and direct connection with the collision.

Was the deceased a passenger? We think not. It is not every person who may enter a car, or go upon a train, or even ride upon a train, that can thereby claim that he is a passenger, or that he is entitled to all the rights and privileges of a passenger. (U. P. Ry. Co. v. Nichols, 8 Kan. 505.) Among the reasons why the deceased was not a passenger in the legal sense of the term we would state the following: He bought no ticket, paid no fare, nor offered to buy any ticket or pay any fare. Nor did he intend to buy any ticket or pay any fare. He did not at any time claim to be a passenger, or act as such. He did not go into a passenger car, nor upon a passenger train. But on the contrary, as he was a mere employe of the railway company, he chose to ride as such, and all the time acted as such. He went into a caboose car attached to freight train, and rode in such caboose car as an employe of the company, because he was an employe, where other servants and employes of the company rode, and from which passengers, and all other persons except employes of the company, were excluded; and of this exclusion the deceased had full knowledge. He was going from his home to the place of his employment, as was his custom, for the purpose of performing the duties of his employment, and rode in the caboose car on a freight train, and paid no fare, according to custom, usage, understanding and agreement of the parties. Now, as the facts of this case show beyond all doubt that the deceased was not a passenger, but merely an employe of the company, the charge of the court was erroneous, the finding of the jury with regard to the negligence of the company was erroneous, not being sustained by any evidence, and the judgment founded on the ver-

dict was erroneous. The plaintiff did not by the evidence make out any case against the defendant, and the court therefore erred in refusing to grant a new trial. (Higgins v. Han. & St. Jo. Rd. Co., 36 Mo. 418; Gilshannon v. Stony Brook Rd. Co., 10 Cush. 288; Seaver v. Boston & Maine Rd. Co., 14 Gray 466; Russell v. Hudson River Rd. Co., 17 N. Y. 134.) Chapter 93 of the laws of 1870, p. 197, has no application to this case. That act applies only where a railway company, as a company, has been negligent, and does not apply to negligence between co-employes of a railway company. The judgment of the court below must be reversed, and cause remanded for a new trial.

All the justices concurring.[1]

BAIRD v. PETTIT.

1872. Supreme Court of Pennsylvania. 70 Pa. St. 477.

Williams, J.—The plaintiff below was employed as draftsman in the works carried on by the defendant for the manufacture of locomotive engines. On the evening of the 15th of November, 1865, after the hands had quit work, he left the building where he was employed and was on his way home, when he fell over a pile of dirt and rubbish on the sidewalk in front of the premises, a few feet from the steps of the building, which had been thrown out in deepening a cellar, and left on the pavement, and in falling received the injury for which this action was brought. The work of excavating the cellar was done under the superintendence of the carpenter employed to do the jobbing work about the premises, but the men who did the excavation, as the jury have found, were subject to the defendant's direction and control.

Is the defendant, then, liable for the injury occasioned the plaintiff by their negligence? If they were engaged in the same common employment with the plaintiff, the defendant is not responsible for the injury, because the plaintiff in entering into the defendant's service assumed all the risks usually and necessarily incident to the employment. One of these risks, as is well settled, is the liability to injury from the negligence of fellow workmen. But if they were not in the same common employment, the defendant is liable for the injury occasioned by their negligence, for the plaintiff did not take upon himself any risk except such as are ordinarily incident to the business in which he was engaged. The defendant's business was the manufacture of locomotive engines, for which the plaintiff was

[1] *Accord:* Russell v. Hudson River R. R., 17 N. Y. 134.
Compare State, use of Abell, v. West Md. R. R. Co., 63 Md. 433.

employed to make the drawings. In accepting the employment he took upon himself all the risks necessarily incident to the business. But the workmen by whose negligence he was injured were not engaged in the manufacture of engines, nor in the performance of any service connected with the business. There is not a particle of evidence that the cellar they were excavating had been or was intended to be used for any purpose connected with the business carried on by the defendant. If, in order to exempt the master from responsibility, it is not necessary that "the servant causing, and the servant sustaining the injury should both be engaged in precisely the same or even similar acts," it is essential that they should be engaged in the same common employment, and that they should be working for the same common end. As it was the plaintiff's business to make drawings for tools and engines, all persons engaged, or in carrying on the works, however employed, must undoubtedly be regarded as his fellow-workmen and engaged in the same common employment. But with what propriety can it be said that the workmen who excavated the cellar were engaged in the same common employment as the plaintiff? Servants, it is said, are engaged in a common employment when each of them is occupied in service of such a kind that all the others, in the exercise of ordinary sagacity ought to be able to foresee, when accepting their employment, that it may probably expose them to the risk of injury in case he is negligent. That this is the proper test is evident from the reason assigned for the exemption of masters from liability to their own servants, viz., that the servant takes the risk into account when fixing his wages. He cannot take into account a risk which he has no reason to anticipate, and he does take into account the risks which the average experience of his fellows has led him, as a class, to anticipate. Shearman & Redfield on Negligence 109. If this is the rule—and we are not disposed to question its soundness—how could the plaintiff, in the exercise of ordinary sagacity, foresee, when accepting the employment of draftsman, that it would probably expose him to the risk of injury from the negligence of the workmen employed by the defendant to excavate the cellar? What reason had he to anticipate the risk so as to take it into account in fixing his wages? Manifestly the negligence which occasioned the plaintiff's injury was not one of the risks which he assumed in entering into the defendant's employment.

But there is another reason for holding that the rule which exempts a master from liability for an injury occasioned by the negligence of a servant does not apply in this case. The relation of master and servant did not exist between the parties when the plaintiff received the injury. He was not then in the service of the defendant; he had quit work and was then on his way home. He was no longer subject to the defendant's control, or bound to obey his orders. As soon as he left the building he was his own master. He

was then no more in the defendant's service than any other citizen passing along the street, and he was entitled to the same rights and immunities. If the relation of master and servant did not cease when he left the building, after his day's work was done, when did it? It cannot be pretended that it followed the plaintiff home and remained with him while there. And if not, it must have ceased when he left the building, and he had the same right to an unobstructed sidewalk in front of defendant's premises as any other citizen; and if injured by a dangerous obstruction, the same remedy for an injury. It will scarcely be contended that if, while on his way home, he had been run down by the defendant's carriage, through the carelessness of the driver, the defendant would not have been responsible for the injury, because the negligence of the driver was one of the risks which the plaintiff assumed when he entered into his service. But in principle what difference is there between the two cases? Why is not the driver of defendant's carriage as much the plaintiff's fellow-servant as the digger of the cellar? And why should the plaintiff be required to foresee and take into account the risk arising from the negligence of the one and not the other? There is no real difference between the cases, and neither case is within the rule which exempts masters from liability for injuries occasioned by the negligence of their servants. It is clear that this case is not within the rule, not only for the reason that the injury did not happen to the plaintiff while he was engaged in the defendant's service, but because it was not occasioned by any of the risks he assumed when he entered into his employment. The risk which occasioned the injury was not one incident to the business, and to which only the workmen engaged in carrying it on were exposed; but one unconnected with the business, and to which all citizens having occasion to pass along the street were as much exposed as the plaintiff and his fellow workmen.

It follows from what we have said that there was no error in the instructions given by the learned judge of the district court to the jury, or in his refusal to affirm the points submitted by the defendant.

Judgment affirmed.[1]

HARPER, by Wood, His Next Friend, v. THE INDIANAPOLIS & ST. LOUIS RAILROAD CO.

1871. Supreme Court of Missouri. 47 Mo. 567.

Wagner, J.—This case was here on a former occasion, and will be found reported in 44 Mo. 488. The action was for damages, and

[1] Compare Ewald v. Chicago, etc., R. Co., 70 Wis. 420.

after it was sent back by this court for a re-trial, there was an amended petition and a verdict for the plaintiff. The amended petition states "that on the 9th day of July, 1867, plaintiff was in the employ of defendant as conductor of one of its construction trains running on said road; that on said day, while plaintiff was discharging his duties as conductor of said train, he was, without any carelessness or negligence on his part contributing thereto, but solely through the mismanagement of the locomotive engine attached to and drawing said train, thrown on the railroad track and injured, etc.; that the injuries so complained of resulted to plaintiff while he was in the performance of his duties as aforesaid, without any carelessness on his part contributing thereto, solely and directly from the fault, negligence and want of care of defendant, in this: that there was no engineer at said time upon or in charge of said locomotive engine, but the same was then and there, without the knowledge or consent of the plaintiff, but with the knowledge and by permission and authority of defendant, being managed and controlled by a fireman, said fireman being then and there, with the knowledge and by permission and authority of defendant, in the performance of an engineer's duties in and about said locomotive engine; that said fireman was not an engineer, nor was he fit or competent to perform the duties of an engineer in and about said locomotive engine, of all which defendant at said time had full and competent knowledge."

The defendant, answering this petition, failed to deny, and therefore admitted, that the fireman in charge of the engine at the happening of the injury was not fit or competent to perform the duties of an engineer in and about the locomotive engine, and that plaintiff suffered injury. All the remaining allegations of the amended petition were controverted by the answer. Certain affirmative matter stated in the answer was denied in a reply filed by the plaintiff, but it was expressly admitted in the replication that William Griffith, the engineer who had been assigned to the locomotive of the train whereof plaintiff was conductor, was, at the time of the happening of the injury, a competent and skilful engineer.

The following abstract of the testimony presents the essential facts as proved upon the trial: That in February or March, 1866, plaintiff was appointed conductor of a construction train on defendant's railroad, and continued in defendant's service in that capacity until July 9th, 1867, when he suffered the injury complained of. His duties as conductor were to direct the engineer when and where to move the train; to superintend and oversee a party of twenty or thirty laborers attached to the train when at work, and to act as brakesman and switchman where his services in those capacities were required. Plaintiff had no other authority over the engineer than that stated above; and with the management and control of the loco-

motive he was not permitted to interfere, that being a skilled employment.

The fireman was subordinate to the engineer and not subject to the orders of the conductor. At the time of the happening of the occurrence which gave rise to this suit, William Griffith was engineer of the locomotive attached to the train, and James Blansfield was fireman. Blansfield was appointed fireman on the 20th of June, 1867, previous to which time he had been a laborer. On the afternoon of July 9th, 1867, having finished work at Alton, plaintiff directed Griffith to take the train to Alton Junction, a distance of two or three miles; to slack up on arriving there, that plaintiff might cut off the last car, and then place the train in the sand-pit, a few hundred yards beyond the station. The train consisted of twelve or thirteen platform cars and a box-car, which was next to the engine. As the train arrived at the junction, plaintiff walked back, and, standing at the end of the last car but one, with his back to the locomotive, stooped down and pulled out the coupling-pin. Before he could recover an upright position, the train, which had slacked its speed and was moving slowly, started suddenly ahead, plaintiff was thrown on the track, and was run over by the car which had been cut off and which was slowly following the train. When this occurred the engineer was on the platform at the junction, having, without plaintiff's knowledge, left the locomotive to the charge and management of Blansfield, the fireman, who had pursued that occupation but nineteen days. The movement of the train which threw plaintiff off was caused by the fireman letting on the steam. Plaintiff says in his testimony that he intended, after replacing the pin and regaining an upright position, to wave his hand for the engine to move ahead, but was prevented by the hasty and negligent act of Blansfield, who started without waiting for the signal. Upon this point there was evidence given for the defense tending to show that the plaintiff did give the signal; but this was rebutted by counter-testimony in support of the plaintiff's statement. The evidence was conflicting, and therefore the jury alone could determine the fact. It was further testified that on defendant's railroad, with the knowledge of the superintendent of engineers, and without objection from or any restraint imposed by them, firemen were permitted to manage locomotives, in the absence of the engineers, at side-tracks, stations, and when switching, if deemed competent to do so by their respective engineers; and that, in accordance with this state of facts, Griffith, deeming Blansfield competent, had, prior to the injury, yielded up management of the engine to him. It was also shown that the management of a locomotive so far involved science, skill and experience, that firemen served an average term of three years as firemen before they were considered competent to assume the duties and responsibilities of engineers. Upon this state of facts the court gave the following instructions for the plaintiff:

motive he was not previously to introduce, into such a skilled employment.

The fireman was responsible to the engineer, and subject to the orders of the conductor. At the time of the occurrence of the occurrence which gave rise to this suit, Wilson Griffith was engineer of the locomotive attached to the train, and James Plainfield was fireman. Plainfield had entered upon the duties of June, 1867, previous to which time he had been employed on the Western of July 9th, 1870, [illegible] work on [illegible] Griffith to take the [illegible] Junction, a distance of two or three miles, to [illegible] there, the plaintiff might cut off the last car and [illegible] the train to the switch-pit a few hundred yards beyond [illegible]. The train consisted of twelve or thirteen platform [illegible], which, [illegible] to the engine. As the train [illegible] the junction, plaintiff walked back, and, standing at the [illegible] car but one, with his back to the locomotive, [illegible] pulled out the coupling pin. Before he could recover [illegible] position, the train, which had slacked its speed [illegible], started somewhat suddenly, and plaintiff was thrown [illegible] was run over by the car which had been cut off [illegible] was closely following the train. When this occurred [illegible] on the platform of the caboose, having, with [illegible] charge left the locomotive in charge and [illegible] the fireman, who had pursued that course [illegible]. The movement of the train which threw plaintiff off was [illegible] fireman letting on the steam. Plaintiff says in his [illegible] he intended, after replacing the pin and regaining [illegible], to wave his hand for the engine to move ahead, but [illegible] by the hasty and negligent act of Plainfield, who started [illegible] without waiting for the signal. Upon this point there was [illegible] for the defense, tending to show that the plaintiff did give [illegible] signal; but this was rebutted by counter-testimony in support of [illegible] statement. The evidence was conflicting, and [illegible] jury alone to determine the fact. It was further [illegible] defendant's railroad, with the knowledge of the superintendent [illegible] engineers, and without objection from [illegible] any [illegible] to [illegible] were employed to manage locomotives, in the absence of the engineers, [illegible] tracks, stations, and when switching [illegible] were subject to [illegible] by their respective engineers; and that, in accordance with this [illegible] of facts, Griffith, deeming Plainfield [illegible] fast, prior to the injury, yielded up [illegible] management of the engine to him. It was also shown that the management of a locomotive [illegible] was a matter of skill and experience, that [illegible] served an apprenticeship of three years as fireman before they were considered competent to assume the duties and responsibilities of engineers. Upon [illegible] state of facts the court gave the following instructions for the plaintiff:

"1. If the jury believe from the evidence that the plaintiff, while in the employ of the defendant, without any fault or negligence on his part contributing thereto, through the mismanagement of the locomotive engine by a fireman, suffered injury, and they further believe from the evidence that the superintendent of engineers on, or superintendent of, defendant's road knew that the engineers of defendant's road permitted firemen to manage and control locomotive engines, in the absence of engineers, about switches and stations, and failed or neglected to prohibit the same, then, unless plaintiff had knowledge that the fireman was permitted to do an engineer's duty therein on said engine, or was at the time of the accident performing said duty, they will find a verdict for the plaintiff.

"2. The jury are instructed that it stands admitted by the pleadings in this case that the fireman, who at the time of the accident was in charge of the locomotive engine, was not fit or competent to perform the duties of an engineer in and about said locomotive engine."

The other instructions need not be noticed, as no point is made upon them in this court. For the defendant the court gave these instructions:

"1. The jury are instructed that, it being admitted by the plaintiff in his pleadings that William Griffith was a competent and skilful engineer, the plaintiff is forbidden to dispute the fact, and the jury must discard from their consideration so much of the testimony of John Harper as related to the incapacity or want of sobriety of Griffith.

"2. The jury are instructed that if they believe from the evidence that, at the time of the injury sued for, plaintiff was in defendant's employ as a conductor of one of its trains, and in the discharge of his duties as such; that the injury complained of was occasioned either by plaintiff's own carelessness, unskilfulness or negligence, or by that of the engineer or other person in charge of the train, they should find for the defendant, provided defendant has exercised proper care in the selection of persons competent for the performance of the respective duties of engineer and fireman of the train whereof plaintiff was, at the time of the injury, conductor.

"3. The jury are instructed that if they believe from the evidence that plaintiff, by his own recklessness, carelessness or unskilfulness, contributed to the injury for which he sues, or that by the exercise of ordniary care, skill or prudence on his part the accident could have been avoided, they will find for the defendant."

The following instructions, which it is deemed necessary to notice as numbered in the series, and which were offered by the defendant, were refused:

"5. The jury are instructed that the incapacity of the fireman to act as an engineer does not justify a recovery against defendant unless it has been established that the defendant authorized him to act as such; and a permission to the engineer, when the fireman was

by the engineer deemed competent to act temporarily as engineer, does not make the defendant responsible for a mistake or negligence of the engineer in permitting a fireman to handle the engine when incompetent for the duty.[1] * * *

"7. The jury are instructed that it is admitted by the plaintiff in his pleadings that William Griffith, the engineer of the train at the time of the accident sued for, was a careful, competent and skilful engineer; if, therefore, the jury should find from the evidence that Griffith was guilty of negligence in surrendering charge of the locomotive engine of the train to one who was incompetent to manage it, and that plaintiff's injury was the result of such negligence, plaintiff is not entitled to recover, because the negligence of his fellow-servant was one of the risks he assumed by his hiring to defendant.

"8. The jury are instructed that if they believe from the evidence that the plaintiff was, at the time of the accident sued for, in defendant's employ as one of the conductors of its trains, and that the injury sued for was occasioned by the negligence, carelessness or unskilfulness of one of those employed by defendant on the same train, and this without the knowledge or consent of defendant, then plaintiff is not entitled to recover, if defendant has taken proper care to engage competent servants to perform the duty assigned to them, or if the plaintiff, at the time of the accident sued for, knew that the fireman only of the train was in charge of the engine, and plaintiff was acquainted with the fireman's ability and skill to perform the duties of engineer.

"9. The jury are instructed that if they believe from the evidence that the injury was the result of the negligence or unskilfulness of one James Blansfield, a fireman at the time acting as engineer, and unfit to perform the duties of an engineer; that Blansfield acted as engineer in compliance with a custom of the defendant to permit its firemen, in the absence of the engineer, to act as such, at stations or when switching; that this custom existed before plaintiff was employed as a conductor for defendant, and became known to him after his employment as conductor, then plaintiff is not entitled to recover."

The tenth instruction, in reference to the person in charge of the engine being subordinate to the plaintiff, was properly refused, there being no evidence to justify it.

The jury, in finding a verdict for the plaintiff, acting under the instructions of the court, must have found, and did find, that the plaintiff received the injury, and that he did not contribute thereto; that the accident happened in consequence of the mismanagement of a locomotive engine by a fireman; that the fireman was managing the engine with the knowledge or by permission or authority of de-

[1] A portion of the opinion is omitted.

fendant, and that this was without the plaintiff's knowledge or consent. The incompetency of the fireman to act as engineer is conceded. With the weight of the evidence we have nothing to do; the jury has passed upon that, and their verdict binds us. We have only to inquire whether the law was correctly laid down by the court.

Whilst this court has followed the prevailing doctrine that a servant of a corporation who has been injured by the negligence, misfeasance or misconduct of a fellow-servant, can maintain no action against the master for such injury, yet it has been expressly held otherwise where injuries to servants or workmen happen by reason of improper and defective machinery and appliances used in the prosecution of the work, or where the servant by whose negligence or misconduct the injury was occasioned is not possessed of ordinary skill and capacity in the business intrusted to him, and the employment of such incompetent servant is attributable to the want of ordinary care on the part of the master. McDermott v. Pacific R. R. Co., 30 Mo. 115; Rohback v. Pacific R. R. Co., 43 Mo. 187; Gibson v. Pacific R. R. Co., 46 Mo. 163.

In Shearman & Redfield on Negligence it is said that "proof of the employment of one who had always been a mere clerk or a common laborer, to run a steam engine, would raise a presumption of negligence on the part of the master, without showing that he had actual notice of the servant's antecedents;" for, as the authors state in another place, "it is the duty of a master to employ servants of sufficient care and skill to make it probable that they will not cause injury to each other by the lack of those qualities." (Shearm. & Redf. Neg., §§ 90, 91.)

In the case of the Illinois Cent. R. R. Co. v. Jewell, 46 Ill. 99, it was held that the company was liable to a fellow-servant for an injury received while in their employment, resulting from the incompetency of an engine-driver, where that incompetency was known to the company. In Wright v. N. Y. Cent. R. R. Co., 25 N. Y. 565, the court says: "The master is liable to his servant for any injury happening to him from the misconduct or personal negligence of the master, and this negligence may consist in the employment of outfit and incompetent servants and agents, or in furnishing for the work to be done, or for the use of the servants, machinery or other implements and facilities improper and unsafe for the purposes to which they are to be applied." In a later case in the same court, while recognizing and laying down the general rule that a master is not responsible to those in his employ for injuries resulting from the negligence, carelessness or misconduct of a fellow-servant engaged in the same general business, the court proceeds to say: "The only ground, then, which the law recognizes, of liability on the part of the defendant, is that which arises from personal negligence, or such want of care and prudence in the management of its affairs or the selection of its agents or appliances, the omission of which oc-

casioned the injury, and which, if they had been exercised, would have averted it." Warner v. The Erie R. R. Co., 39 N. Y. 471.

In Snow v. Housatonic R. R. Co., 8 Allen 444, 445, the supreme court of Massachusetts examines the principle and gives the rule the following clear exposition: "Now, while it is true, on the one hand, that a workman or servant, on entering into an employment, by implication agrees that he will undertake the ordinary risks incident to the service in which he is engaged—among which is the negligence of other servants employed in similar services by the same master—it is also true, on the other hand, that the employer or master impliedly contracts that he will use due care in engaging the services of those who are reasonably fit and competent for the performance of their respective duties in the common service, and will also take due precaution to adopt and use such machinery, apparatus, tools, appliances and means as are suitable and proper for the prosecution of the business in which his servants are engaged, with a reasonable degree of safety to life and security against injury." The case of Noyes v. Smith, 28 Verm. 63, is also a case adopting the same principle; and while it recognizes fully the rule that a master is not liable to his servant for an injury occasioned by the negligence of a fellow-servant in the course of their common employment, the court says: "Such rule has no application where there has been actual fault or negligence on the part of the master, either in the act from which the injury arose or in the selection or employment of the agent which caused the injury." This opinion is sustained by citing to its support the case of Hutchinson v. Ry. Co., 5 Wells, Hurl. & G. 352, which also thus qualifies the rule that the master shall have taken due care not to expose his servants to unreasonable risks. The Vermont court there lays down this rule: "The master, in relation to his fellow-servants, is bound to exercise diligence and care that he brings into his service only such as are capable, safe and trustworthy; and for any neglect in exercising that diligence he is liable to his servant for injuries sustained from that neglect." It is not necessary that he should know that they are unsafe and incapable. It is sufficient that he would have known it if he had exercised reasonable care and diligence. (*Id.*, and cases cited; Gibson v. Pacific R. R. Co., 46 Mo. 163.) Again, in the case of Gilman v. The Eastern R. R. Corporation, 10 Allen 233, 239, an employe of the defendant brought his action for an injury occasioned by the negligence of a switchman in failing properly to adjust the switch upon the track. The court held that the plaintiff, being a fellow-servant in the employ of the same railroad company, could not have recovered of their common master; but they add: "The evidence offered by the plaintiff at the trial was competent to show that the defendant, knowingly or in ignorance, caused by its own negligence, employed an habitual drunkard as a switchman, and thereby occasioned the accident. Of the sufficiency of this evidence a jury must judge. If the plaintiff

can satisfy them that such misconduct or negligence in the defendant caused the injury, and that he himself used due care, he may maintain his action." In the same case they say: "It is well settled, both in England and America, that a master is bound to use ordinary care in providing his structures and engines and in selecting his servants, and is liable to any of his fellow-servants for his negligence in this regard."

These cases incontrovertibly establish the law and overwhelmingly support the theory upon which the case was submitted to the jury by the instructions. If the defendant was negligent or unmindful of its duty in employing competent and skilful servants in the execution of its business, and injury resulted therefrom to a fellow-servant, it must be held responsible. And of the sufficiency of the proof to sustain this fact the jury were the proper judges. The instructions given on both sides fairly and substantially embraced these views, and we think, therefore, that they were unobjectionable. As the whole case was presented by the instructions given, we see no error in the refusal of instructions for defendant, as, with one exception, they asserted nothing that was not sufficiently covered by those given. That exception is in the one numbered five in the series, and declares that a permission to the engineer, when the fireman was by the engineer deemed competent to act temporarily as engineer, did not make the defendant responsible for a mistake or negligence of the engineer in permitting a fireman to handle the engine when incompetent for the duty. This instruction concedes the authority from the company to the engineer to allow a fireman to handle the engine, but denies that the employment by the engineer is to be considered the act of the company.[1] * * *[2]

Judgment affirmed.

[1] A portion of the opinion is omitted.

[2] "It is the duty of a railroad company in employing its servants to use ordinary care and diligence to select only those who are fit and proper persons to be engaged in that duty. The care and diligence which is required is measured by the nature of the duties to be performed by the servant who is employed." McCrary, J., to jury in Crew v. St. Louis, etc., Ry. Co., 20 Fed. Rep. 87, 88.

"In the absence of any evidence as to the exercise of care on his selection, proof that a servant who has been in that service but two or three weeks was incompetent when employed need not be supplemented by proof of the company's knowledge of his incompetency. The presumption that defendant had done its duty is overcome by proof that the servant was incompetent when employed." McGrath, J., in Lee v. Mich. Cent. R. R. Co., 87 Mich. 574, 579.

In Kersey v. Kansas City, etc., R. R., 79 Mo. 362, it was held that to entitle a servant to recover from the master for an injury caused by a fellow-servant, it is not sufficient to show that the fellow-servant was incompetent, and that the master was negligent in employing him; it must also be shown that the fellow-servant was guilty of negligence directly contributing to the injury.

TEXAS & PACIFIC RAILWAY COMPANY v. JOHNSON.

1896. Supreme Court of Texas. 89 Tex. 519.

Brown, Assoc. J.—Joe Johnson was in the employ of the appellant as conductor of a freight train and at the time of his injury was engaged in the discharge of his duty as conductor on a freight train going west from Fort Worth. The injury occurred on the second day of June, 1891. The train on which Johnson was acting as conductor stopped at a water tank for the purpose of taking water, and stayed there the usual and necessary time. When about to leave the tank the train on which Johnson was, was run into from the rear by another freight train, which was known as the second section of the first train. The second section was in charge of one C. S. Roberts as conductor.

We copy the following from the conclusions of fact as found by the court of civil appeals:

"3. That the regular conductor of section No. 2 of train 17 was one Conrad, but for some reason he did not go out on his train that night, as was expected, but one Roberts was put in charge of the train as conductor, and plaintiff did not know that Roberts was put in charge of the second section which was to follow him that night, and could not have known thereof by the use of ordinary diligence, as he left Fort Worth with his train some time before Roberts was put in charge of section two of the train.

"4. That Roberts was in the employment of defendant as a brakeman, but had been, in May, 1890, appointed also to the position of 'extra conductor.' An extra conductor, as proven by the defendant's officers, is a man that runs other conductors' trains when they are laying off, sick, or something of that kind, or might be called upon to act upon any train in the absence of the regular conductor. An extra conductor has no regular caboose crew. The plaintiff, at and before the accident, knew that Roberts had been appointed extra conductor, and was liable to be put in charge of trains at any time.

"5. The plaintiff testified that he did not know, and had not been informed prior to the time of the injury, that Roberts was a reckless, incompetent conductor; but the evidence showed that such was Roberts' general reputation among the employes of appellant on the division of the road where plaintiff and Roberts were both engaged, upon the testimony of which employes plaintiff mainly relied to show this general reputation, and that plaintiff and Roberts were personally acquainted. Whether he had such knowledge then was a controverted issue in the case.

"7. Plaintiff's injury was caused by the negligence and recklessness of Roberts, conductor on the second section of the train, in failing to have his train under control, as required by defendant's rules, when he ran into the water station.

TEXAS & PACIFIC RAILWAY COMPANY v. JOHNSON.

(No. [illegible]. Decided [illegible], 1906.)

[illegible]

The plaintiff's injury was caused by the negligence and recklessness of Roberts, conductor on the second section of the train, in failing to have his train under control according to defendant's rules when he ran into the rear section.

"9. We find that, at the time Roberts was placed in charge of the second section of train 17, the division superintendent of defendant, who had control over the appointment and discharge of conductors and trainmen on that division of defendant's road, knew that Roberts was a reckless conductor, and had known it for at least a month, and had only a month or two previous thereto investigated charges against him for recklessly running into the caboose of a train at Coal Mine station, and found him guilty, and suspended him from service for fifteen days; but we also find that at the time he was appointed as extra conductor, in May, 1890, neither the defendant nor its officers knew of his incompetency or recklessness as a conductor, and that at that time he had made no reputation as a conductor, either good or bad."

The majority of the court of civil appeals held that the judgment of the district court should be reversed and the cause remanded, stating their reasons for such conclusion in the following language:

"The court in effect charged that if the defendant, with knowledge of Roberts' incompetency, retained him in its service, and the injury inflicted upon the plaintiff was brought about by that incompetency, the company would be liable, even though the plaintiff knew of such incompetency, provided he did not further know, or by the use of ordinary diligence, was unable to ascertain that the incompetent conductor was in charge of the train following that under the control of the plaintiff.

"The majority of this court are of opinion that the concluding proposition of this instruction is erroneous; that it vitiates the charge and requires a reversal of the judgment, as in all probability it seriously affected the verdict of the jury."

Justice Hunter of the said court dissented from the opinion of the majority, which dissent has been certified to this court.

The points of law involved in the certificate of dissent arise upon the latter part of the charge as quoted above, and for convenience we will state the questions as follows:

First: Was there any evidence before the jury in this case which would have authorized them to find that before the accident Johnson knew of the recklessness and incompetency of Roberts as a conductor? If not, was there error in the charge of the court, if it be error, such as to justify a reversal of the judgment of the district court?

Second: If Johnson knew that C. S. Roberts was employed by appellant as a brakeman and also as extra conductor, and knew that Roberts was reckless and incompetent as a conductor, but did not know that he, Roberts, was to go on the road as conductor that night, did Johnson assume the risk of injury which might occur from the incompetency of Roberts as conductor in case he should be put in charge of the train which was to follow Johnson's train?

There is no question that Roberts, the fellow-servant from whose

negligence the injury occurred, was incompetent and unsafe as conductor, and that the railroad company knew the fact when it sent him on this trip, and it must be held liable to Johnson for the injury received by him in the discharge of the duties of his employment by reason of the negligence of Roberts while performing his duties as an employe of the railroad company, unless it has been proved that Johnson knew of the unfitness and reckless character of Roberts before the accident. Railway v. Mussette, 86 Tex. 720; Railway v. Farmer, 73 Tex. 88; Beach on Contributory Negligence, §§ 127, 128.

Mr. Beach, in his work referred to, in § 127, uses this language: "The responsibility of a master to each of his servants for the competency and fitness of the other servants he employs to work with him is in every way analogous to the duty he owes them in regard to the machinery and all the other instrumentalities he furnishes for the performance of the work." The servant is not required to investigate as to the condition of the machinery furnished to him, nor is he required to examine into the character of the servants employed to work with him; but he may, and generally must, act upon the assumption that the master has performed his duty in selecting and retaining such servants. McKinney on Fellow-Servants, § 95; Rolling Stock Co. v. Wilder, 116 Ill. 100; Railway v. Meyers, 55 Tex. 114.

In Railway v. McNamara, 59 Tex. 258, in which the injury was caused by defect of the track, the injured party being a brakeman upon the train, the court said: "The master is chargeable with knowledge which he might have acquired by the exercise of due care, the same as if he actually possessed it, whereas the servant has the right to assume that all necessary examinations have been made by the master, and is not required, either in person or by another employed by him for the purpose, to examine the machinery as to fitness and sufficiency." In another part of the same opinion, after speaking of the duty of the master to keep the track in good order and the diligence required of the employe, the court said: "The law requires no such extraordinary vigilance and care of servants, nor charges them with knowledge of facts which they could have learned only by their exercise."

It is claimed that Johnson had equal opportunity with the railroad company to know the character of Roberts, and for that reason he cannot recover. This claim is based upon the testimony of Roberts' general reputation among the employes of the defendant engaged in service with him. In order to charge the railroad company with notice of Roberts' unfitness for his work, by proving that it might have known of such fact if it had used ordinary care, the plaintiff proved that the general reputation of Roberts among his fellow-servants was that of a reckless, careless and dangerous conductor. This evidence was admissible against the defendant for

the reason that it was under obligation to inquire into the character of its servant, Roberts, and its failure to learn of his general reputation among its employes was of itself negligence. Mr. McKinney, in his work on Fellow-Servants, § 90, says: "Evidence of general reputation is admissible to prove the unfitness of a fellow-servant, and ignorance of such general reputation on the part of the master is itself negligence, in a case in which proper inquiry would have obtained the necessary information, and where the duty to inquire was plainly imperative." It was not necessary for Johnson to prove that he did not know of the incompetency of Roberts; the burden rested upon the defendant to make that proof. Yet, if the evidence introduced by Johnson of Roberts' general reputation was such as would have authorized the jury to find that plaintiff knew of Roberts' recklessness and unfitness, it would have the same effect as if introduced by the defendant, and no more. In other words, it was incumbent upon the defendant in that case to show Johnson's knowledge of Roberts' character, unless it appeared from the testimony offered by Johnson himself.

The difference in the effect of general reputation upon the rights and duties of the railroad company and Johnson lies in this, that, it being the duty of the former to inform itself of the character of its servants, the proof of general bad reputation fixed the liability of the company without proving knowledge of the reputation or of the character of the servant, but, as to the servant Johnson, the proof was simply a means by which it might be shown that he knew of the character of Roberts as a conductor. The general reputation might be proved in order to show this knowledge, but it must go further, and either show that he knew of that reputation, or place him in such relation thereto by his surroundings that a jury could conclude that he did know of the fact. For example, if the proof had shown that the reputation of Roberts had been discussed in the presence of Johnson, under such circumstances as that a man with ordinary sense of hearing must have heard the conversation, then the jury might conclude that he did hear it, and that he knew of such reputation, but this would simply be a matter of proof upon the issue of knowledge of character of Roberts. In order to entitle the defendant to have the judgment reversed in this case, the testimony must be such that the jury could, in the proper exercise of their functions, have found that Johnson knew of the recklessness of Roberts, and, if it falls short of this measure of certainty, then it is insufficient to authorize the court to reverse on account of the charge in question.

It would be absurd to say that Johnson might prove the general reputation of Roberts as a conductor in order to fix liability on the part of the railroad company, but that, having made this proof, he is chargeable with notice of that general reputation to the same extent as the defendant, and therefore could not recover. This would

make the evidence of his right to recover destructive of the very cause of action that it was introduced to sustain.

The facts show that Johnson did not know of the reputation of Roberts, nor of his reckless character, and the proof which was introduced as shown by the conclusions of fact found by the court of civil appeals, was not sufficient to justify the jury in finding that Johnson had such knowledge.

We answer the first question, that there was no evidence which authorized the court to submit a charge to the jury upon the hypothesis that Johnson knew of Roberts' reckless character as a conductor. It did not matter whether Johnson knew that Roberts would follow him on the train that night or not; for, if he knew that Roberts was to act as conductor upon the second section of that train, it not appearing from the evidence that Johnson knew of Roberts' reckless character, no other verdict could have been rendered under the evidence than that which was rendered by the jury. If, therefore, it be conceded that the court erred in that part of the charge which informed the jury that Johnson could recover if he did not know that Roberts was to follow him on that night, it was an immaterial error, and did not justify a reversal of the judgment of the district court.

Our conclusion upon this question renders it unnecessary to consider the second question; for the reason stated, that the matter embraced therein becomes immaterial by the decision of the question herein considered. We therefore make no answer to the second question embraced in the certificate of dissent.[1]

BAULEC v. NEW YORK & HARLEM RAILROAD COMPANY.

1874. Court of Appeals of New York. 59 N. Y. 356.

Appeal from judgment of the general term of the supreme court in the third judicial department, affirming a judgment in favor of defendant entered upon an order nonsuiting plaintiff upon trial at circuit.

This action was brought to recover damages for the alleged negligent causing of the death of Thomas Hammond, plaintiff's intestate.

Said Hammond was, at the time of his death, in the employ of defendant as a fireman upon a locomotive running upon its road. The accident occurred at a junction of defendant's road with the New

[1] Regarding constructive notice to master of servant's incompetence see Chicago, etc., R. R. Co. v. Doyle, 18 Kan. 58.

York and New Haven road, and, as the evidence tended to show, was occasioned by the negligence of defendant's switchman at that point, one McGerty, who, after the passage of the New Haven train, changed the signal so that it indicated that the switch was right for the Harlem train without changing the switch.

Plaintiff offered evidence upon the trial that some six or seven months before this accident a New Haven freight train met with a similar accident at this same switch. This evidence was objected to and received under objection. The proof as to the former accident left the question in doubt whether it was chargeable to McGerty or to the engineer upon the train. It was a dark night. The tracks of the two roads ran parallel for some distance. McGerty had set the switch for the New Haven road. It did not appear that the bell upon the engine of the New Haven train was rung or its whistle sounded. McGerty not hearing it supposed it was a special on the Harlem road and changed the switch and the train ran off. It appeared that the general agent of the road having authority to employ and discharge switchmen investigated the occurrence, and after evidence of the facts continued McGerty in his position. It appeared, also, that he had been in the employ of the defendant for eight or nine years; had been switchman at this point some eighteen or twenty months, and at another post about five months. No other evidence was offered of any want of competency or of negligence on his part.

ALLEN, J.—But a single question is presented by the record before us in this action. It is conceded, or if not conceded it must be regarded as too firmly established as well upon principal as by authority to be now questioned, that if a master is wanting in proper care in the selection of servants, and negligently or knowingly employs or retains in his service those who are incompetent and unfit for the duties to which they are assigned, he is liable to respond to other employes and servants engaged in the same service, who may sustain damage by reason of such incompetency and unfitness. And when the master is a corporation, necessarily acting by and through agents, the acts of its general agents charged with the employment and discharge of servants, in the performance of that duty, must be regarded as its acts. The corporation should be regarded as constructively present in all acts performed by its general agents within the scope and range of their ordinary employment. It is equally well settled that when reasonable precautions and efforts to procure safe and skilful servants are used, and without fault one is employed through whose incompetency damage occurs to a fellow-servant, the master is not liable. (Laning v. N. Y. C. R. R. Co., 49 N. Y. 521; Flike v. B. & A. R. R. Co., 53 *id.* 549; Wright v. N. Y. C. R. R. Co., 25 *id.* 562; Tarrant v. Webb, 18 C. B. 797; Ormond v. Holland, El., Bl. & El. 102.) There is nothing in the case to justify the impu-

tation of a want of care in the first or original employment of McGerty, the switchman, by whose want of care and neglect of duty, as is charged, the injury was occasioned to the deceased, resulting in his death. The complaint is that he was retained in the service of the defendant, and in the same capacity as a switchman, after he had shown himself unfitted for the position and unsafe to be trusted in it. Proof was given of a single occurrence in respect to which it was claimed an accident similar to that which resulted in the death of the deceased was occasioned by his negligence and carelessness, and that knowledge of the facts was brought home to the general agents of the defendant. When as here the general fitness and capacity of a servant is involved, the prior acts and conduct of such servant on specific occasions may be given in evidence with proof that the principal had knowledge of such acts. The cases in which evidence of other acts of misconduct or neglect of servants or employes, whose acts and omissions of duty are the subject of investigation, have been held incompetent, have been those in which it has been sought to prove a culpable neglect of duty on a particular occasion, by showing similar acts of negligence on other occasions. This class of cases does not bear upon the case in hand, and may be laid out of view. Proof of specific acts of negligence of a servant or agent on one or more occasions, does not tend to prove negligence on the particular occasion which is the subject of inquiry. When character as distinguished from reputation is the subject of investigation, specific acts tend to exhibit and bring to light the peculiar qualities of the man, and indicate his adaptation, or want of adaptation to any position, or fitness or unfitness for a particular duty or trust. It is by many or by a series of acts that individuals acquire a general reputation and by which their characters are known and described, and the actual qualities, the true characteristics of individuals, those qualities and characteristics which would or should influence and control in the selection of agents for positions of trust and responsibility, are learned and known. A principal would be without excuse should he employ for a responsible position, on the proper performance of the duties of which the lives of others might depend, one known to him as having the reputation of being an intemperate, imprudent, indolent, or careless man. He would be held liable to the fellow-servants of the employe for any injury resulting from the deficiencies and defects imputed to the individual by public opinion and general report. Still more should he be chargeable if he had knowledge of specific acts showing that he possessed characteristics incompatible with the duties assigned him and which might expose his fellow-servants and others to peril, and harm. Frazier v. Pennsylvania R. Co. (38 Penn. St. 104), is adverse to these views. There evidence was admitted over the objection of the defendant, of repeated acts of negligence of the conductor (by whose carelessness the plaintiff, a brakeman on the train, was injured), resulting in collisions before

the time of the injury to the plaintiff, for which the conductor had been fined by the company, and that the agents of the defendant knew those facts; and it was held error. The court while conceding, that the character grows out of special acts, held that it could not be proven by them, and the case was classed with those in which character is proved by way of impeachment and in which it would be impossible to investigate specific acts and in which general reputation alone can be given in evidence. It is safe to say that this decision has not been received with approval by the profession. (Whart. on Neg., § 238, and notes.) It is reviewed in Pittsburgh, F. W. & C. R. Co. v. Ruby (38 Ind. 294), in a very satisfactory opinion by Buskirk, J. The court in that case was of the opinion and so held, what I think the most reasonable doctrine, that for the purpose of showing that the officers of a railroad corporation did not exercise due care, prudence and caution in the employment of, or in retaining in service, careful, prudent and skilful persons to manage and operate its road, and for the purpose of charging such corporation with notice of the incompetency of its employes, specific acts of negligence or unskilfulness of such employes may be proved. In the case cited the conductor, through whose "gross negligence, carelessness and want of attention" in leaving a switch unadjusted and thereby causing a collision and consequent injury to the plaintiff, was proved to have, about a year before, carelessly and negligently left a switch open by which a train was thrown from the track, and a short time before the injury to the plaintiff and the same fall to have been "guilty of gross negligence" in disobeying orders, to wait at a given station for a train passing east, and in signaling the engine to go on after he had ordered down brakes, from which facts and circumstances the jury found that the conductor was a careless and unfit person for that position. The court merely remark, as to the effect to be given to the evidence impeaching the qualifications of the conductor, in response to the contention of counsel that the verdict was not sustained by evidence, that they were satisfied that the verdict was sustained. The case had been twice tried, resulting in a verdict for the plaintiff on each trial, and the court declined to disturb the last verdict.

The duty of a railroad corporation is to exercise due, that is ordinary care, in the selection and employment of its servants and agents, having respect to their particular duties and responsibilities and the consequences that may result from the want of competence, skill or care in the performance of their duties. If without exercising such care and caution, employes and agents are selected who are incompetent, or in any respect unfitted for the position, and harm and loss come to others by reason of such incompetency or unfitness, the corporation must answer for their neglect and want of care in employing a servant incompetent or untrustworthy.

There is no impeachment or attempt to impeach the qualifications

and fitness of McGerty as a switchman, except by the proof of a single occurrence, several months before the occurrence in question. It is not contended that the defendant was wanting in the exercise of due care in his original employment, and it must be assumed that he was competent when employed and reasonably intelligent, and was during all the time he was in the service of the defendant, sober, temperate, attentive to his duties, carefully, intelligently and successfully performing the service required of him with the single exception referred to. At the time of the accident, he had been in the service of the defendant in different capacities for eight or nine years, had served as switchman over a year and a half, at or near the point at which the plaintiff's intestate was injured. Six or seven months before the time last referred to, a train had been thrown from the track by a misplaced switch while McGerty was in charge, which the plaintiff claims was caused by his carelessness, want of attention, or mistake. If it be conceded that the negligence of McGerty upon the prior occasion is established, it by no means follows that the defendant was bound to discharge him upon peril of being charged with neglect and a want of due care in retaining him in its service. An individual who by years of faithful service has shown himself trustworthy, vigilant and competent, and is not disqualified for further employment, and proved either incompetent or careless and not trustworthy, by a single mistake or act of forgetfulness and omission to exercise the highest degree of caution and presence of mind. The fact would only show what must be true of every human being, that the individual was capable of an act of negligence, forgetfulness or error of judgment. This must be the case as to all employes of corporations until a race of servants can be found free from the defects and infirmities of humanity. A single act may under some circumstances show an individual to be an improper and unfit person for a position of trust, or any particular service, as when such act is intentional and done wantonly, regardless of consequences, or maliciously. So the manner in which a specific act is performed may conclusively show the utter incompetency of the actor and his inability to perform a particular service. But a single act of casual neglect does not, *per se*, tend to prove the party to be careless and imprudent, and unfitted for a position requiring care and prudence. Character is formed and qualities exhibited by a series of acts, and not by a single act. An engineer might from inattention omit to sound the whistle or ring the bell at a road crossing, but such fact would not tend to prove him a careless and negligent servant of the company. The company is only charged with the duty of employing those who have acquired a good character in respect to the qualifications called for by the particular service, and no one would say that a good character acquired by long service was destroyed or seriously impaired by a single involuntary and unintentional fault. (Murphy v. Pollock, 15 Irish C. L. 224.) But this appeal does not

necessarily depend upon the correctness of this view of the effect to be given to a single instance of neglect. All that the corporation defendant was bound to do, after the occurrence, was to inquire into it, and ascertain the facts, and act in the discharge or retention of the switchman with reference to the facts as ascertained, as reasonable prudence and care should dictate, and if such care and caution was exercised, the company is not liable, although its general agent erred in judgment in retaining the switchman in the same service. Ordinary care and a reasonable exercise of discretion and judgment is all that is necessary to absolve the corporation from the charge of neglect or duty in such a case.

The transaction upon which stress is laid, and by force of which it is now sought to charge the defendant with the consequences of the servant's neglect on this occasion, and the agency of the switchman in causing the accident on that ocasion was investigated immediately thereafter by the agent of the defendant whose general duties included such investigation, and who was authorized to employ and discharge switchmen at that point. He had the statement of the switchman himself and in this record we have his sworn statement of the same transaction, and assuming as we must that the facts disclosed upon this trial were made known to the agent and representative of the defendant, then it was certainly a question of doubt whether the fault of that accident was upon the switchman or the engineer in charge of the train that was thrown from the track. There is no evidence that he rang the bell or gave other signal of the approach of his train as he was bound to do by the rules of the road, and of the service upon a train going south on the New Haven track. The switchman heard no signal and only learning of the near approach of the train by the noise made by the running of the train he might reasonably, in the hurry and haste incident to the occasion, have supposed that it was an extra upon the Harlem track, which did not signal when going south, and thus be innocently led into the mistake causing the accident. The corporation might well come to the conclusion that the misplacing of the switch on that occasion was not a negligent or careless act on the part of the switch tender. And if a reasonable man might infer that the switchman was careless, or acted unadvisedly and without proper caution, it does not follow that general carelessness and imprudence can be inferred from this single act in a man as to whose conduct on other occasions there could be no imputation of negligence or inattention, or that a want of reasonable care could be inferred on the part of the corporation in retaining him.

To justify a recovery by the plaintiff from this single instance there must be inferred not only the carelessness as a characteristic of the switchman and his consequent unfitness for that particular service, but the want of due care in the corporation in investigating

the occurrence and determining upon the retention of the man. The corporation did not guarantee the absolute fitness of their servants and agents for their respective employments, and is only responsible for some fault in employing, or continuing them in its service. The question in this case was, whether the single occurrence detailed by the witness, in connection with other circumstances and with his general character and conduct, was such as to make it necessary for the defendant in the exercise of proper care and prudence, such as the law enjoins, to discharge this switchman. I am clearly of opinion that there was not sufficient evidence to carry the case to the jury. A verdict against the defendant based upon this evidence would have been against evidence, and such being the case it was the duty of the court to nonsuit. This case as reported upon a former trial (5 Lansing 436), and the decision there made, is quoted with apparent approval by Mr. Wharton in his recent treatise on the law of negligence, and the principle there decided makes a part of the text of section 238 of that work. It is not enough to authorize the submission of a question, as one of fact, to a jury, that there is "some evidence. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, would not justify the judge in leaving the case to the jury." (Per Williams, J., in Toomey v. Railway Co., 3 C. B. [N. S.] 146.) The same learned justice adds that every person who has had any experience in courts of justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result. In another case it is held that a judge will not be justified in leaving the case to the jury when the plaintiff's evidence is equally consistent with the absence as with the existence of negligence in the defendant. In such case the party affirming negligence has altogether failed to establish it, and Earle, C. J., says, "that is a rule which ought never to be lost sight of." (Cotton v. Wood, 8 C. B. [N. S.] 568.) This rule applied to this case leads to an affirmance of the judgment for it cannot be denied that the evidence is as consistent with the idea that the defendant did carefully investigate the occurrence of which evidence was given, and with proper prudence and in the exercise of due care continue McGerty in its employ, as that they were negligent in the performance of that duty and carelessly or imprudently retained him with knowledge that he was not a proper man for the position. At most the jury could only conjecture that the defendant might have been wanting in the care and caution proper to be exercised in such a case, and if so the case was properly withheld from the jury. (Avery v. Bowden, 6 E. & B., 973, 974; McMahon v. Lennard, 6 H. of L. Cases, 970, 993.)

I am of the opinion that the plaintiff was rightfully nonsuited, and that the judgment should be affirmed.

All concur, except Folger, J., not voting.
Judgment affirmed.[1]

(b) VICE-PRINCIPAL AND SUPERIOR SERVANT DOCTRINES.

MOORE v. THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY.

1885. SUPREME COURT OF MISSOURI. 85 Mo. 588.

HENRY, C. J.—This is an action to recover damages for an injury alleged by plaintiff to have been sustained by him while in the employ of defendant as car repairer. The cause of action stated in the petition is, that at Stanberry, a station on defendant's road, defendant kept a car shop, and had in its employ a foreman of car repairs, who had sole charge and control of hands employed to repair cars. That on the nineteenth day of October, 1881, and while plaintiff was so employed as a car repairer, the said foreman ordered and directed the plaintiff to repair the draw-head of one of the freight cars of defendant company, then standing with other freight cars upon a side-track of defendant, at said town of Stanberry, and while said cars were detached from any engine; that said foreman of car repairs then and there promised plaintiff that he would protect him while so employed in repairing said draw-head, and would prevent and keep away any train or engine from coming in or entering upon the said side-track, and plaintiff, in obedience to the order and direction, and relying on the promise of said foreman, undertook to repair the draw-head of said freight car, and while engaged thereat, and being upon the side-track of said defendant, and between two of the freight cars of said company, an engine of defendant came in and upon said side-track, and against the cars standing thereon, and the car upon which the plaintiff was at work was driven back against the freight cars standing in the rear thereof, and plaintiff's right arm was caught and crushed between said cars; that the said foreman failed and neglected to protect the plaintiff while at work on said draw-head, and failed and neglected to prevent and keep said engine from coming upon said side-track, and utterly failed and neglected to notify or inform the person in charge of said engine that plaintiff was at work upon the draw-head of said car, upon said side-track.

The answer denied every allegation in the petition, and for a further defense alleged, that at and long prior to the date of plain-

[1] See opinion of Coffey, J., in Lake Shore, etc., Ry. Co. v. Stupak, 123 Ind. 210, 228.
See Laning v. N. Y. Cent. R. R., 49 N. Y. 521.

tiff's injury, the defendant had adopted a rule, requiring all car repairers, when engaged in repairing cars, to set out red flags on each side of the place where they were at work, as signals of warning to approaching trains, and that Kestler, the foreman, and the defendant and O'Connor who was at that time engaged with plaintiff in repairing the car in question, had notice of the rule, but that defendant and Kestler on that occcasion neglected to observe it, and that the injury was attributable to his own and the negligence of O'Connor, his fellow servant. The replication was a denial of the new matter pleaded in the answer. On the trial plaintiff had a judgment for $8,450, from which defendant has appealed.

It is virtually conceded by plaintiff that no red flags were set out, as required by the rule of the company, but there was evidence tending to prove that plaintiff had no knowledge that such a rule had been adopted. There was evidence, however, tending to prove the facts alleged in plaintiff's petition, and the question in the cause which presents the most difficulty, is whether plaintiff and the foreman of car repairs were fellow servants. If they were not, and the foreman is to be regarded is the *alter ego* of the company in the transaction which is the basis of this action, plaintiff was absolved from the duty of observing said rule by the promise of the foreman to use proper precautions for his safety. Appellant's counsel say that the rule by which to determine who are fellow-servants is well stated by Mr. Wood in his work on Master and Servant, at page 860, as follows: "Whenever the master delegates to another the performance of a duty, to his servants which the master has impliedly contracted to perform in person, or which rests upon him as an absolute duty, he is liable for the manner in which that duty is performed by the middle man whom he has selected as his agent, and to the extent of the discharge of those duties by the middle man, he stands in the place of the master, but as to all other matters he is a mere co-servant." The cases on this subject, reported in the books, are numerous and contradictory, and it would be an endless task to review, and utterly futile to attempt to reconcile, them.

Whether the foreman, in this case, had or had not authority to employ and discharge car repairers, by no means determines his relation to the plaintiff at the time the latter was injured. It is asserted in some of the cases that it is a test, but a corporation might adopt a by-law, taking from every officer of the company the authority to employ and discharge hands, and vest it in the board of directors, still leaving with the proper officers the control and direction of the work the hands were engaged to perform. This would not constitute the general manager, or other general officer, a fellow-servant of all the men engaged in his department of the service. If the law were otherwise, a railroad corporation would escape liability to its servants in every case, unless it should be proved that the directors had negligently employed the servant whose negligence

occasioned the injury, or retained him in the service after learning his unfitness. If we may venture a general proposition on the subject, it is, that all are fellow-servants who are engaged in the prosecution of the same common work, leaving no dependence upon or relation to each other, except as co-laborers without rank, under the direction and management of the master himself, or of some servant placed by the master over them. If a person employs another to perform a duty which he would have to discharge if another were not employed to do it for him, such employe, as to that service, stands in the master's stead, with relation to other persons. A railroad corporation impliedly contracts, not only to furnish suitable machinery and appliances for its employes to operate and work with, but to keep them in repair, and the latter duty stands upon no different ground than does its obligation to furnish suitable machinery, in the first instance. When he whose duty it is, as representative of the company, to inspect the machinery, sends any of it to the shop for repair, the company is at once chargeable with notice of its condition, and the foreman, in having it repaired for use, is in the line of his duty.

It is true the company was under no obligation to the plaintiff to have the car in question repaired at all. It owed no duty to any one, except servants who were to use it, or passengers or shippers of freight in that car, to repair it, but the repair of the car was the company's business, if undertaken at all. The company being a corporation, could not be actually present, either to make or direct repairs, but, having ordered its repair, it had to be represented by some one or more to do the work, and by some one to determine where, how and when it should be repaired. The person who had control of the work, and of the men engaged in it, directing how, when and where it should be done, represented, in those matters, the company itself. It was the duty, a contractual obligation, of the company to provide for the safety of the men at work in repairing the car. The company devolved that duty upon the person who represented it in conducting, ordering and managing the work, and the men engaged in it. It could not impose that duty upon the car repairers, so as to absolve itself from liability for its own negligence. It might make, as it did, reasonable rules, and impose the duty upon the servants to observe those rules, for their own safety, but could not impose upon them the entire duty of protecting themselves. The foreman, in what he had to do for the company, did not represent himself. Except as the agent of the company, he had no interest in the repair ordered. He did none of the manual labor in repairing the car, but, for the company, gave such orders and directions to the car repairers as he thought proper. That the foreman was an inferior servant to Buck, who had a general control and management of car repairs everywhere along the line of the road, does not determine that the foreman was a fellow-servant of plaintiff.

In some of the cases and text books the rule is announced that, where a master has committed the entire control and management of his business to another, reserving no discretion or control to himself, the person to whom such power is delegated stands in the place of the master, so that his acts are in law the acts of the master. Such authority to an agent would certainly constitute him the *alter ego* of the principal, but it is not true that, because the master has reserved, either to himself or some superior agent, some control over the inferior agent, the latter cannot stand in the place of the master. Strictly speaking, all servants from the general manager, down through all the grades of the service, to a brakeman, are engaged in the common work of running trains of cars, and it is only when one of these servants is placed "by the master in his stead to discharge some duty which the master owes to the servant," that he ceases to be the fellow-servant of the others, and becomes the representative of the master. Every spike driven into a cross-tie is driven with reference to the running of trains over the road, and the man who wields the sledge to drive it, is, in some sense, a fellow-servant of every one employed by the company whose services are necessary to the running of trains. Says Mr. Wood: "The instances are rare in which the master, either by himself, or some superior servant, does not reserve some supervision over every department of his business, or, at least, reserve such a right to himself." Sec. 438.

Buck, the general superintendent of car repairs, was not a fellow-servant of plaintiff, and could not have been so regarded if he, instead of Kestler, had been present and given the order, and made the alleged promise to protect plaintiff in obeying that order. And if, by authority of the company, Kestler was placed there to do what fell in the line of Buck's duty, did he not, in respect to that matter, stand in the same relation to the company as Buck himself? And if Buck had personally done what it is alleged Kestler did, could the company have successfully defended the action on the ground that Buck and plaintiff were fellow-servants? We recognize the principle that one may act in the dual character of a representative of the master, and as a fellow-servant. If it had been the duty of the foreman, in this case, to assist, when necessary, in the manual work of repairing the car, in addition to the other duties of superintending, controlling, and directing such work, and he had gone under the car with plaintiff to assist in repairing it, and by some negligent or unskilful act, while so engaged, injured the plaintiff, the latter could not have recovered without proof of facts which entitle one to recover when injured in consequence of the negligence or unskilfulness of a fellow-servant. Under the circumstances proved in this case, we think that plaintiff and Kestler were not fellow-servants.

The defendant's refused instructions asserted the following general propositions, viz., that although plaintiff and Kestler were not fellow-servants, Kestler was not authorized by the company to make

the promise alleged to protect plaintiff while under the car, and that notwithstanding such promise, yet plaintiff could not recover if he failed to set out the red flag, as required by the rule, or to set some one to watch for the approach of engines and trains. It being conceded, as it must be, that the company owed a duty to the men under the car to provide for their safety, can it be that the foreman had no authority in an emergency to use any other means than those adopted by the company? That the red flags, and nothing but the red flags, was the means he was to employ? If for any reason that would clearly, in a given case, have been insufficient as a warning, can it be possible that the foreman would be restricted to the use of the red flags? Or if, in such case, he had had the red flag set up, and one of the men was injured in consequence of its insufficiency to give the warning, that the company would not be liable to the injured party? Has it discharged its duty by simply adopting a means of protection ordinarily sufficient, when the person in charge of the work knows that in the particular case it is not a sufficient warning? If the foreman has authority in such an emergency, that authority results from his general authority to perform the duty of the company, in protecting the employes under his control, in the performance of a dangerous work for the company, and he was authorized to make the promise to the plaintiff for the company, and undertook to set out the red flags in his possession, or to adopt any other means necessary to secure the safety of the men, thereby absolving them from the duty of setting out the flag, or setting the watch. As to the latter, there was no proof of a rule requiring one man to watch while the others worked; and it was in proof that while the work in question could possibly have been done by one man, it could not be conveniently or promptly done by less than two.

It being the duty of the company to provide for the safety of men while engaged in its dangerous service, if it delegates such authority as to the employment of men, and their control and management to an agent, will the law, in the absence of an express stipulation to that effect, declare that such agent is under no obligation, and has no power, as the representative of the company, to provide means for the safety of servants whom he sends into a place of danger to work? If so, the duty of the company to provide such security may be easily evaded by having no one on hand to perform it. And by simply adopting reasonable rules, the observance of which will ordinarily afford protection, although in a given instance the observance of such regulations would afford no protection whatever, and the person representing the company in the direction of the work and the control of the hands, knew the fact. Such abdication of duty can certainly find no support, either in reason or authority.

The judgment is affirmed. All concur.[1]

[1] See discussion of distinction between fellow-servant and vice-principal in Anderson v. Bennett, 16 Ore. 515.

DOBBIN v. RICHMOND AND DANVILLE RAILROAD COMPANY.

1879. Supreme Court of North Carolina. 81 N. C. 446.

Civil action for damages tried at Spring Term, 1879, of Rowan Superior Court, before Schenk, J.

The plaintiff alleged that he was employed by the defendant company as a train hand, under the control and management of one T. W. Lowrie, an employe and superintendent of the company, and by the direction of said Lowrie, he was engaged in digging gravel, when by the negligence of the defendant's employe, a bank of dirt and gravel fell in upon the plaintiff, whereby he was greatly injured, having his leg broken and being permanently disabled from performing any actual work. The defendant denied the allegations of the complaint and alleged that the injury was caused by plaintiff's own negligence; and that its employes and servants on the material train under said Lowrie were men of ordinary skill and care; and if plaintiff was injured by the negligence of defendant's employes, superintendent, or servants, the defendant is in no way responsible therefor.

The facts set out in the statement of the case are substantially embodied in the opinion delivered by Mr. Justice Ashe, and upon them the court below held that the plaintiff could not recover on the ground that Lowrie was a mere fellow-servant of the plaintiff. Upon this intimation the plaintiff submitted to a judgment of nonsuit and appealed. And it was agreed if this court reverse the decision below, no final judgment is to be given, but only judgment setting aside the nonsuit.

Ashe, J.—This is an action brought by the plaintiff against the defendant to recover damages for an injury to his person resulting from the negligence of the defendant. The defendant in the answer denied the allegations of the complaint, and for a further defense insisted that if the plaintiff was injured by the negligence of defendant's employes, superintendent or servants, the defendant was not responsible for the injury received.

The case was submitted to a jury for trial, and the evidence produced disclosed the facts, that the plaintiff was employed as a train-hand and laborer, and at the time of the injury was engaged in digging gravel under the direction of one T. W. Lowrie, and that said Lowrie was engineer, superintendent, conductor and master of the gravel and material train of the defendant, whose business it was to employ and discharge hands connected with the business for which the gravel train was used; also, that he had entire charge of this branch of business on his section of the railroad, known as that of digging gravel, putting the same upon the track, digging ditches and repairing the same; and also repairing culverts, etc.

After hearing this evidence, his Honor expressed the opinion that

TERRY v. RICHMOND AND DANVILLE RAILROAD COMPANY.

1879. Supreme Court of Appeals, Virginia. 74 Va. 446.

Error to action for damages [illegible] Superior Court, before [illegible]

The plaintiff alleged that [illegible] was employed by the defendant company as a train hand, under the control and management of one J. W. Lowrie, [illegible] superintendent of the company, and by the direction of said Lowrie he was directed to dig the gravel, when by the negligence [illegible] defendant's employés a bank of dirt and gravel fell in upon [illegible] whereby he was greatly injured, having his leg broken [illegible] permanently disabled from performing any [illegible] The defendant denied the allegations of the complaint and [illegible] injury was caused by plaintiff's own negligence [illegible] and servants on the material train [illegible] ordinary skill and care, and a plaintiff [illegible] negligence of defendant's employés, superintendent [illegible] accident, or in no way connected therefor. [illegible] the argument of the case [illegible] considered by Mr. Justice Anderson, and upon them [illegible] the plaintiff could not recover on the [illegible] a mere fellow-servant of the plaintiff. Upon this statement the plaintiff submitted to a judgment of non-suit and [illegible] to this court. Upon appeal to this court reversed the decision [illegible] is to be given and only judgment setting aside the [illegible]

[illegible] This [illegible] action of the plaintiff against the defendant to recover damages for an injury to his person resulting from the negligence of the defendant. The declaration is the answer denies the allegations of the complaint and for a further defense [illegible] that if the accident was caused by the negligence of defendant's employés, superintendent or servants, the defendant was not responsible for the injury received.

The case was submitted to a jury for trial, and the evidence produced disclosed the fact that the plaintiff was employed as a train-hand and laborer, and at the time of the injury was engaged in digging gravel under the direction of one J. W. Lowrie, and that said Lowrie was engineer, superintendent, conductor and master of the gravel and material train of the defendant company, whose business it was to employ and discharge hands connected with the business for which the gravel train was used; also, that he had the entire charge of this branch of business as to the portion of the road known as that of digging gravel, putting the same upon the cars, digging ditches and repairing the same, and also repairing culverts, etc.

After hearing this evidence [illegible] expressed the opinion that

the plaintiff could not recover, admitting that he was injured by the negligence of said Lowrie, for the reason as he alleged that Lowrie was a mere fellow-servant of the plaintiff.

Who is a fellow-servant within the meaning of the law appertaining to this subject, is a difficult question, one that has never been decided in this state. And so far as we have been able to find, no definition of the relation as a test applicable to all cases, has as yet been adopted by the courts; and we do not think can be, so variant are the relations subsisting between master and servant, principal and agent, co-laborer and employe, in the various enterprises and employments, with their numerous and divers branches and departments; the cases frequently verging so closely on the line of demarcation between fellow-servants or co-laborers and what are called "middle men," that it is difficult to decide on which side of the line they fall. Each case in the future as heretofore will have to be determined by its own particular facts.

Where the relation of fellow-servants or co-laborers is found to subsist, it is well established by the English as well as American authorities, and is conceded in the argument of this case, that the master is not responsible for an injury to one of his servants occasioned by the negligence of a fellow-servant engaged in the same business or employment. This principle has been so universally recognized by the courts, that it may be regarded as a general rule of law. And the reason of the rule is, that where one engages to serve, he undertakes, as between him and his master, to run all the ordinary risks of the service, which includes the risk of the negligence of his fellow-servants, acting in the discharge of his duty as servant of the common master, and engaged in the same common employment. But he does not undertake to incur the risks that may result from the negligence of the master, or such person to whom he may choose to delegate his authority in that branch or department of business in which he is engaged. To impute the negligence of such an agent to the master, he must be more than a mere foreman to oversee a batch of hands, direct their work under the supervision of the master, see that they perform their duty, and in case of dereliction, report them. He must have entire management of the business, such as the right to employ hands and discharge them, and direct their labor, and purchase materials, etc. He must be an agent clothed in this respect with the authority of the master, to whom the laborers are put in subordination, and to whom they owe the duty of obedience. Such an agent is what is known as a "middle man," who as well as the laborer is the servant of the master, and although he may work with the laborer in furthering the common business of the master, he is yet not a "fellow-servant" in the sense of that term as used by the courts, because he represents the master in his authority to direct, control and manage the business. To such an agency, the maxim of *"qui facit per alium"* applies. His acts are the acts of the master;

his duties, the duties of the master; and his neglects and omissions, the neglects and omissions of the master.

We think this principle clearly deducible from the more recent and most approved adjudications on this subject.

In the case of Lanning v. N. Y. Cent. R. R. Co., 49 N. Y. 529, it was held that where the business is of such a nature that it is necessarily committed to agents, as in the case of corporations, the principal is liable for the neglects and omissions of duty of one charged with the selection of other servants, in employing and selecting such servants, and the general conduct of the business committed to his care. To the same effect is Flike v. Boston & Albany R. R. Co., 53 N. Y. 549.

In Corcoran v. Holbrok, 59 N. Y. 520, which was the case where an operative had been injured by the falling of an elevator in consequence of a defect in the chain by which it was operated, the court held that when the master delegates to one agent the performance of duties which he is bound to perform towards his employes, the agent occupies the place of the master, and he is deemed to be present and is liable for the manner in which they are performed.

And in Brothers v. Carter, 53 Mo. 372, where the plaintiff was injured by the falling of a bridge, the superintendence of the construction of which had been committed to a head carpenter; it was held if the master deputes the superintending control of the work, with the power to employ hands and purchase and remove materials, to an agent, then the master acts through the agent, and the agent becomes the master, the duties are the duties of the master, and he cannot evade the responsibilities which are incident and cling to them, by thus delegating to another. In such case the agent represents the master, and though in truth he may be and is a servant, yet in those respects he is not a co-servant, a co-laborer, a co-employe, in the common acceptation of the term. He is an agent and stands instead of the principal, and is not a fellow-servant within the meaning of the rule, as applied to laborers or workmen.

And again in the case of Brickner v. N. Y. Cent. R. R. Co., 2 Lansing 504, it was held that the corporation cannot act personally. "It requires some person to superintend structures, to purchase and control the running of cars, to employ and discharge men, and provide all needful appliances. This can only be done by agents. When the directors themselves personally act as such agents, they are representatives of the corporation. They are then the executive head or master. Their acts are the acts of the corporation. The duties above described are the duties of the corporation. When these directors appoint some person other than themselves to superintend and perform all these executive duties for them, then such appointee equally with themselves represents the corporation as master in all these respects; and though in the performance of these executive duties, he may be and is a servant of the corporation, he is

his duties, the duties of the master; and his neglects and omissions, the neglects and omissions of the master.

We think this principle exactly deducible from the most recent and most approved adjudications on this subject.

In the case of Laning v. N. Y. Cent. R. R. Co., 49 N. Y. 521, it was held that where the business is of such a nature that it is necessary committed to another to the care of one person, the principal is liable for the negligence and omissions of duty of one charged with the selection of such servants in employing and retaining such servants and the general conduct of the business committed to his care. To the same effect is Filer v. Boston & Albany R. R. Co., 53 N. Y. 549.

In Corning v. Troy Iron & Nail Factory, 40 N. Y. 191, which was the case where an operative met with accident on the falling of an elevator in consequence of a defect in the hoist by which it was operated, the court held that when the [illegible] to one agent the performance of duties which he is personally bound towards his employees, the agent occupies the place of the master, and he is deemed to be present and is liable for the manner in which they are performed.

And in Ryan v. Cohoes, 32 N. Y. 370, where the plaintiff was injured by the falling of a bridge, the superintendent of the construction of which was committed to a head carpenter, it was held that the [illegible] superintending [illegible] of the work, and the power to employ hands and purchase and provide materials, to an agent, does not relieve him through the agent, and the agent becomes the principal. The duties are the duties of the master, and he cannot evade the responsibility which are incident and due to him by their delegation to another. In such case the agent represents the master, and though a servant he is not a servant, yet as those towards whom he is [illegible] a co-employee of the [illegible] the term. He is an agent and stands instead of the master, and [illegible] within the meaning of the rule announced to laborers or workmen.

And so in the case of Sherlock v. Alling, 93 U. S. 99, and Laning, Sup. [illegible] and the corporation cannot act personally. It requires some person to superintend its affairs, to purchase and control the property of same, to employ the managers and provide all needful [illegible]. This can only be done by agents. When the directors themselves personally act as such agents, they are representatives of the corporation. They are then the executive head or master. Their acts are the acts of the corporation. The duties above described are the duties of the corporation. When these directors appoint some person other than themselves to superintend and perform [illegible] executive duties for them such appointee acting by and [illegible] represents the corporation as master in all these respects, and through in the performance of these executive duties he may be and is a servant of the corporation, he is

not in those respects a co-servant, a co-laborer, a co-employe, in the common acceptation of those terms, any more than is a director who exercises the same authority. Though such superintendent may also labor like other co-laborers, and may be in that respect a co-laborer, and his negligence as such co-laborer, when acting as co-laborer, may be likened to that of any other, yet when, by appointment of the master, he exercises the duties of master—as in the employment of servants, in selection for the adoption of the machinery, apparatus, tools, structures, appliances and means suitable and proper for the use of the other and subordinate servants—then his acts are executive acts, are the acts of a master, and then corporations are responsible that he shall act with a reasonable degree of care for the safety, security and life of the other persons in their employ. These executive duties may also be distributed to different heads of different departments, so that each superintendent within his sphere may represent the corporation as master. In controlling and directing structures, in employing and dismissing operatives, in selecting machinery and tools, thus he speaks the language of a master. Then he issues their orders to their operatives. Then he is the mouthpiece and interpreter of their will. Their voice which is silent is spoken by him. He then only speaks their executive will, not the irresponsible will of a fellow-workman or co-laborer. The corporation can speak and act in no other way. His executive acts are their acts, his negligence is their negligence; his control, their control. He has in his executive duty no equal. He is not, while in the performance of these executive duties, only the equal of the common co-laborer or co-servant.". Harper v. Ind. & St. Louis R. R. Co., 47 Mo. 567; Mullan v. Phila. & So. Mail & Steamboat Co., 78 Pa. 25.

We might refer to other decisions, but we think those cited establish the principle which governs the present case. We have examined the authorities cited by the counsel of the defendant and regret that several of them were inaccessible; but those we have been able to examine do not controvert the general doctrine recognized in the cases heretofore cited, except the case of Shearman v. Roch. & Syracuse R. R. Co., 17 N. Y. 153. But in that case two of the judges did not sit, and another expressed no opinion. In Davis v. Detroit & Mil. R. R. Co., 20 Mich 153, the cause of action was an injury sustained by a yard-man of the company by the negligence of an engineer who was alleged to be incompetent, and it retained him in service after notice of his incompetency. But the case was decided in favor of the defendant, because the plaintiff failed to show that defendant had knowledge of the incompetency of the employe. And the case of Tindall v. Ohio & Miss R. R. Co., 13 Ind. 366, was where a set of hands were at work for the company graveling a part of the track. The same hands loaded and unloaded the cars conveying the gravel, and rode back and forth on the cars. While thus employed the train through the alleged carelessness of the engineer

ran against an ox, was thrown off the track, and one of the employes was killed. It was held that the engineer and the deceased were engaged in the same general undertaking, and the representative of the deceased could not recover. The case is not in conflict with those cited above. The person killed and the engineer were co-laborers. The engineer had no authority over the laborers.

Applying the principle to be gathered from the current of authorities to our case, we think it is clear that Lowrie was what is termed a middle man; for it was in evidence that he was engineer, superintendent, conductor and master of the gravel and material train, whose business it was to employ and discharge hands connected with the business for which the gravel train was used, and that he had entire charge of the business on his section of the railroad. He was no co-laborer with the plaintiff; he had no equal in his business; he was the representative of the defendant. The laborers engaged in the same business were in subordination to his authority, as master *pro hac vice;* they were bound to yield obedience to his commands; and his acts were the acts of the defendant, and his neglects, the neglects of the defendant.

We are of the opinion there is error, and the nonsuit must be set aside. Let this be certified to the superior court of Rowan county, that further proceedings may be had in accordance with this opinion and the law.

Error. Reversed.[1]

O'BRIEN v. AMERICAN DREDGING COMPANY.

1891. Supreme Court of New Jersey. 53 N. J. L. 291.

Plaintiff's action was brought to recover damages for an injury received by him by reason of his foot having been drawn into the machinery of a steam dredge, whereon he was employed as a "deck hand." The dredge was owned by defendant, and was, at the time, used in dredging the James river, near Richmond, under a contract with the United States government.

The machinery had stopped because the chain had jumped from the drum, and the plaintiff took a position which exposed him to the injury if the machinery moved.

[1] *Accord:* Chicago, etc., R. R. v. May, 108 Ill. 288.

"Where the master, or one placed by him in charge of men engaged in his service, personally assists or interferes in the labor being performed under his direction and control, and is, while performing such labor, or interfering with its performance, guilty of negligence resulting in an injury to one engaged in such service, there is no sound principle of law that will excuse or exonerate the master from liability." Boynton, J., in Berea Stone Co. v. Kraft, 31 Ohio St. 287, 291.

The evidence was conflicting whether plaintiff had been ordered to take that position by one Cannon, who was called "captain" of the dredge.

The machinery was set in motion by Cannon and caused plaintiff's injury.

It was matter of contest upon the evidence whether Cannon or other workmen gave notice to plaintiff of the danger of his position, or of the proposed movement of the machinery.

There was a verdict for plaintiff, and this rule was granted.

MAGIE, J.—One of the reasons assigned in support of this rule is based on the contention that Cannon, whose act occasioned the injury of plaintiff, was a fellow-servant of plaintiff, and that their common employer, the defendant, is not liable for Cannon's negligence (if his act was negligent), unless it appears that defendant did not exercise proper care in employing him, or in retaining him in its employ, of which there was no proof.

The general rule, that servants employed by or under the control of the same master, in a common employment, obviously exposing them to injury from the negligence of others so employed or controlled, although engaged in different departments of the common business, are fellow-servants who assume the risk of each other's negligence, and cannot have recourse to the master for any injury resulting therefrom, as announced and established in a series of cases in our courts (Harrison v. Central R. R. Co., 2 Vroom 293; Paulmier v. Erie R. R. Co., 5 *id.* 151; McAndrews v. Burns, 10 *id.* 117; Ewan v. Lippincott, 18 *id* 192; Rogers Locomotive Works v. Hand, 21 *id.* 464), is not brought in question, but its correctness is conceded by plaintiff's counsel.

On the other hand, it is also conceded that a master may employ and put in his place a representative, for whose negligence occasioning injury to a servant, also in his employ, he will be liable. The rule thus conceded has been applied by our courts only in the case of Smith v. Oxford Iron Co., 13 Vroom 467. The question there was, whether an incorporated company was liable to an injured servant whose injury was occasioned by the neglect of its president. The case showed that the superintendence of the business of the company had been committed to its president. He introduced the use of a highly dangerous explosive without instructing the workmen directed to use it in respect to its dangerous qualities. This court held that under such circumstances a duty devolved on the company to give notice of the qualities of the explosive, a failure to perform which would be negligence, and that, having entrusted to its chief executive officer the superintendence of its business, it became his duty to give the required information, and his failure or neglect in that respect was imputable to the company and rendered it liable to its servant injured in the use of the explosive. The superintendent

of the business was thus held to be, in respect to this duty owed by the company to its servants, a representative of the company, whose negligence was its negligence.

The question to be solved in the case before us concerns the relation between the defendant company on the one hand and Cannon and the plaintiff on the other hand, and the rule to be applied in respect to plaintiff's injury, if occasioned by the negligence of Cannon in relation to the common employer disclosed by the evidence. If that relation comes within the doctrine of Smith v. Oxford Iron Co., defendant's liability will be settled; if, however, the relation is different from that then considered, it must be next determined whether it comes within the principles of that case, or whether, upon that or other principle, the liability of the defendant is shown.

In determining the relation of parties, we are bound to assume as proved whatever the jury was warranted in finding from the evidence to sustain plaintiff's action.

Thus considered, the evidence establishes the following, viz.: that defendant is an incorporated company engaged in the business of dredging by steam dredges; that Albertson is the general superintendent of the company, having power to direct where the dredges are to operate, to supervise the employment of workmen and to discharge them; that the steam dredge, whereon plaintiff's injury was received, was directed to be worked in the James river, near Richmond, under a contract with the United States, the control of government engineers and the supervision of an inspector stationed thereon; that Cannon, who was called "captain" of the dredge, was authorized to employ men to work on it, subject to the approval of the general superintendent, who had power to disapprove and discharge them; that the duty of the captain was to operate the dredge in said dredging; that plaintiff was employed by Cannon as a "deck hand" on the dredge, and his duty was to aid in the operation of the dredge, and that Cannon had charge of the men so employed and they were under him.

From this it is obvious that the case in hand does not present the same features as that of Smith v. Oxford Iron Co. The relation which its president and superintendent bore to that company is here paralleled by the relation of Albertson to the defendant. While Cannon was entrusted with some authority to employ workmen, yet, in respect to the operation of the dredge in the prosecution of defendant's business, he was not a general superintendent, but a mere foreman of the gang of workmen engaged with them in the execution of the master's work. He was a superior and they were inferior workmen, but all were employed in a common operation, though in different grades of service.

Does the principle on which that case was decided, or do correct principles, fix a liability on the master under the circumstances of this case?

The rule laid down in that case is based on the proposition that the chief executive officer of an incorporated company, to whom it has committed the superintendence of its business, is, in respect to duties owed to its workmen, its representative.

This proposition accords with that announced by the text writers on this subject, viz., that when a master commits entire charge of his business to another, retaining no oversight and exercising no discretion of his own, the latter becomes, in respect to the duties of the master to the workmen in his employ, an *alter ego,* or vice principal of the master, who is liable for his negligence. Shearm. & R. Neg., § 102; 2 Thomp. Neg., n. 1038, § 34; Whart. Neg., § 229.

Since a corporation must, in general, act by agents, it is evident that when it becomes an employer of men there will exist some agent, who, in respect to its duties to the employed, will be the representative of the company. While, however, it may be necessary for such corporations to act in these respects by agents, the relation between them and such agents will be identical with that between an individual employer and such agents voluntarily employed, and the rules governing the relation will be alike.

It may be that a master, whether an individual or a corporation, in the conduct of an extensive business, may so commit the charge of distinct departments of the common work to different agents that each may represent the master within that department. It may also be that a master may employ one in a dual relation, so that in some respects he may represent his master and in other respects be a mere workman.

But neither of these propositions need now be pronounced upon, for neither is directly involved in the case.

When we examined the adjudged cases involving the application of the rule I have mentioned, and attempting to draw the line between the relation which will constitute an employe the representative of his master and that which will make him a fellow-workman with others, we are confronted with a variety of irreconcilable decisions, evincing a positive opposition of views, between courts administering the same system of laws.

In one line of cases, the mere fact that one servant is endowed with a superior grade of service over others who are subordinated to him, is deemed to establish his position as a representative and vice principal of the master.

Such is the view taken in Ohio, Berea Stone Co. v. Kraft, 31 Ohio St. 287, and cases therein collected; in Illinois, over dissent, Chicago & Alton R. R. Co. v. May, 108 Ill. 288; in Missouri, Cook v. Hannibal, &c., R. R. Co., 63 Mo. 397; in Tennessee, Louisville, &c., R. R. Co. v. Bowler, 9 Heisk. 866, and in Michigan, Chicago, &c., R. R. Co. v. Bayfield, 37 Mich. 205.

So, in the Supreme Court of the United States, it was held, by a divided court, that a conductor of a railroad train, who had a right

to command the movements of the train and to control those employed on it, was not a fellow-servant with such employes, but a representative of the company, for whose negligence it was liable. Chicago & Milwaukee R. R. Co. v. Ross, 112 U. S. 377.

On the other hand, there is a line of well-considered cases which repudiate this doctrine, and hold that a servant, employed as a foreman with other workmen, is not, in respect to such employment, a vice principal, but only a fellow-workman.

A "mining boss" or "driving boss," who were under a general superintendent of a mine, were held, in Pennsylvania, to be fellow-servants of those working with and under them. Lehigh Valley Coal Co. v. Jones, 86 Pa. St. 432. A like principle will be found to underlie the decisions in Ruse v. Biddle, 112 *id.* 72; New York, Lake Erie & Western R. R. Co. v. Bel, *id.* 400; Waddell v. Simonson, *id.* 567, and Lewis v. Seifert, 116 *id.* 626.

A like view is expressed in the courts of New York. Brick v. Rochester, &c., R. R. Co., 98 N. Y. 211; McCosker v. Long Island R. R. Co., 84 *id.* 77; Crispin v. Babbitt, 81 *id.* 516; Malone v. Hathaway, 64 *id.* 5; Hussey v. Coger, 112 *id.* 614, and Loughlin v. State, 105 *id.* 159. In the last cited case, Chicago & Milwaukee R. R. Co. v. Ross, *supra,* was disapproved.

Cases in Massachusetts, some of which carry still further the limitation of the master's liability, are collected in Throop Dig., tit. "Master and Servant," II, 2, § 56.

The following English cases are in the same line: Murphy v. Smith, 19 C. B., N. S., 361; Feltham v. England, 2 L. R., Q. B., 33, and Wilson v. Merry, 1 L. R., S. & D. App., 326.

In the absence of authority in this state, we are at liberty to adopt that view which is most consonant with the reason for denying the liability of a master to a servant for injuries received by the negligence of the fellow-servant.

That liability is denied by the law, because the servant is presumed to have entered upon his contract of service with knowledge that he would be exposed to risk from such negligence, and to have required proper compensation therefor in the wages agreed upon.

The exemption from liability which the law thus raises out of the contractual relation of master and servant, does not, of course, extend to the liability of the master for his own negligence, or for negligence which may be contemplated as his. So, if a master superintend and manage his own business, he will plainly be liable for an injury to a servant resulting from his own negligence; and if he withdraw from the superintendence and management of his business and substitute in his place another, he will be equally liable for the negligence of his vice principal.

Whether the master retain the superintendence and management of his business, or withdraws himself from it and devolves it on a vice principal or representative, it is quite apparent that, although the

master or his representative may devise the plans, engage the workmen, provide the machinery and tools and direct the performance of work, neither can, as a general rule, be continually present at the execution of all such work. It is the necessary consequence that the mere execution of the planned work must be entrusted to workmen, and, where necessary, to groups or gangs of workmen, and in such case that one should be selected as the leader, boss or foreman, to see to the execution of such work. This sort of superiority of service is so essential and so universal that every workman, in entering upon a contract of service, must contemplate its being made use of in a proper case. He therefore makes his contract of service in contemplation of the risk of injury from the negligence of a boss or foreman, as well as from the negligence of another fellow-workman. The foreman or superior servant stands to him, in that respect, in the precise position of his other fellow-servants.

Although the question here presented was not involved in Smith v. Oxford Iron Co., Mr. Justice Van Syckel treated it as settled by the weight of authority that, to exempt the master from liability, the negligent servant need not be on a parity of service with the injured servant.

My conclusion is, that the fact of superiority in grade of service is not a conclusive test in determining the liability of the master. That liability will arise when the negligent employe has been put in the place the master would otherwise occupy, but it will not arise when the negligent employe is a mere boss or foreman in the prosecution of the master's work, such as the master, if controlling and managing his own business, would necessarily employ, and such as a contracting workman would contemplate being employed.

The result is, that the verdict in this case cannot be sustained.

The trial judge left to the jury the determination whether the act of Cannon, which caused plaintiff's injury, was done by Cannon as a representative of defendant, or as a fellow-servant of the plaintiff.

But it was clear, upon the evidence, that Cannon's act was not within the scope of his agency as representative of defendant. If any such agency existed, it was limited to the employment of men in defendant's service. But the act fell within his authority as foreman of the men on the dredge in the prosecution of work for the master in which all were employed, and in respect to which Cannon was a fellow-servant. Therefore, there should have been a nonsuit, or a direction for a verdict for defendant.

The rule to show cause must be made absolute.[1]

[1] See collection of cases *accord* 26 Cyc. 1310.

See Chicago, etc., Ry. v. Ross, 112 U. S. 377, and B. & O. R. R. v. Baugh, 149 U. S. 368, and discussion of these cases in 8 Harv. Law Rev. 57.

"In every case the position of vice-principal must be determined by ascertaining whether the act performed or duty omitted is one the doing of which is charged upon the master and delegated to the servant. In other words,

DWYER v. THE AMERICAN EXPRESS COMPANY.

1892. Supreme Court of Wisconsin. 82 Wis. 307.

Appeal from the Circuit Court for Winnebago County.

Ten years ago the plaintiff brought an action against the defendant, the American Express Company, to recover damages for personal injuries which he claimed to have received in 1881, because of the negligence of one Colvin, who was alleged to be the agent and manager of the defendant's office at Oshkosh. The complaint alleged that plaintiff was employed by the express company to go with wagon loads of goods to and from the defendant's office and the railway depots in Oshkosh, and to load and unload such goods; that on a certain day Colvin drove one of defendant's teams, which was hauling a load of goods for the express company, so negligently that the plaintiff, who in the course of his employment was riding on the load, was injured. That case came to this court on an appeal from an order sustaining a general demurrer to the complaint. Such order was affirmed. 55 Wis. 453.

This action was brought in 1886 to recover damages for the same injuries. The complaint herein differs from the complaint in the former action only in that it is now alleged that Colvin had all the authority of the express company at Oshkosh,—that is to say, he was defendant's vice principal there,—and that it was not his duty to drive the team which he was driving when the plaintiff was injured, "but that it was the duty of, and said work was performed by, servants employed by the defendant for that purpose." The present appeal is by the defendant from an order overruling a general demurrer to the complaint.

Lyon, C. J.—The complaint contains no averment that Colvin was an incompetent person to drive the team in question, or that there was any defect in the teams, wagons, or appliances for making shipments of goods. It is alleged in the complaint that the driving of the team was a duty of servants employed by the express company, and it is conceded that, were Colvin an ordinary hired servant of the company, the complaint would be defective in that it fails to charge the company with any negligence or breach of duty to plaintiff in employing him. So we have for determination the single question whether the mere fact that Colvin was the vice principal of the express company in the transaction of its general business at Oshkosh makes the company liable for his negligent driving of the team,

whether the servant has been put in the place of the master as to the particular service performed or omitted. If he has, and his act or omission, while in that particular service, involves a duty owing by the master to the servant, the master is liable for injury resulting from such act or omission, if the injured servant is free from negligence and has not assumed the hazard." Hackney, J., in New Pittsburgh, etc., Co. v. Peterson, 136 Ind. 398, 403.

DWYER v. THE AMERICAN EXPRESS COMPANY.

1880. SUPREME COURT OF WISCONSIN. 52 Wis. 307.

APPEAL from the [illegible] Court for Waukesha County.

[illegible] the plaintiff brought an action against the defendant, the American Express Company, to recover damages for personal injuries which he claimed to have received on [illegible] because of the negligence of one [illegible] who was alleged to be the agent and manager of the defendant's office at Oconomowoc. The complaint alleged that plaintiff was employed by the express company to go with wagon [illegible] and from the defendant's office and the railway depots [illegible] and to load and unload such goods; that on a certain [illegible] he was one of defendant's teams, which was hauling a [illegible] of the express company, so negligently that the plaintiff [illegible] one of his employers was riding on the load, was [illegible] that was cause to the [illegible] on an appeal from an order [illegible] demurrer to the complaint. Such order was [illegible] and

The [illegible] seeks to recover damages for the same matters. The complaint [illegible] differs from the complaint in the former action [illegible] it is now alleged that Colvin had all the control of the [illegible] at Oconomowoc—that is to say, he was defendant's [illegible] agent—and that it was [illegible] his duty to have the team [illegible] driving when the plaintiff was injured; that [illegible] and said work was performed by servants employed [illegible] for that purpose. The present appeal is [illegible] an order overruling a general demurrer to the complaint.

LYON, C. J. [illegible] contends on argument that Colvin was an incompetent person to [illegible] the team in question, so that there was no [illegible] of the [illegible] employer not having discharged it of [illegible] is averred in the complaint that the driving of the team was a duty of servants employed by the express company, and it is admitted that [illegible] Colvin as ordinary head servant of the company, the [illegible] would be defective in that it fails to charge the company with any negligence or breach of duty to plaintiff in employing him. [illegible] for determining the single question whether the mere fact that Colvin was the [illegible] of the express company in the operation of its [illegible] at Oshkosh makes the company liable for his negligent driving of the team,

[illegible]

when, were he not such vice principal, the company would not be thus liable, as was ruled on the appeal in the former action.

This question has been determined both ways. The courts of some states hold that, if an employer put one servant under the control of another, such servants are not fellow-servants, and the master is liable if the subordinate servant is injured by the negligence of the other, without regard to the nature of the work or business in which they were engaged at the time. The circuit court applied this rule when it overruled the demurrer to the complaint.

Other courts adhere to the doctrine that whether the relation of co-employe or fellow-servant exists between different employes engaged in the same business for the same employer is not to be determined by the rank or grade of either servant, but by the character of the act being performed by them. "If it is an act that the law implies a contract duty on the part of the employer to perform, then the offending employe is not a servant, but an agent, but as to all other acts they are fellow-servants." 7 Am. & Eng. Ency. of Law 834, and cases cited.

This court is unmistakably committed to the latter rule, to wit, that the liability of the master depends upon the nature of the act in the performance of which the injury is inflicted, without regard to the rank of the offending employe. In Brabbits v. C. & N. W. R. Co., 38 Wis. 289, the company was held liable to an employe for injuries caused by the use of an engine out of repair which it was the duty of the foreman of defendant's shops to repair, but which he negligently omitted to do. It was not determined that the foreman was a vice principal, but the company was held liable on the express ground that it owed a duty to plaintiff to repair the engine within a reasonable time after it became defective, and hence that it was liable for the negligent failure of any of its servants or employes to whom that duty was intrusted to repair the defective engine, without regard to the rank or subordination of the negligent servant.

In Howland v. M., L. S. & W. R. Co., 54 Wis. 226, the plaintiff was employed as a shoveler to aid in removing snow from the railway track. He was in a car drawn by an engine, and the work of clearing the track was in charge of a conductor, to whose orders the plaintiff was subject. At a certain point the conductor directed plaintiff to remain in the car and, as it was alleged, negligently attempted to run the engine and car through a snowdrift on the track. In so doing the car was overturned and the plaintiff injured. It was held that the conductor and plaintiff were fellow-servants in the common business of clearing the track, and that the railway company was not liable for the negligence of the conductor.

The above cases fairly illustrate the doctrine of this court on the subject under consideration. In the Brabbits case the company was held, on the principle that it is liable to one of its servants for the negligence of another in respect to any duty intrusted to the latter

to perform, which at the same time is a duty the company owes to the injured servant, no matter how humble or subordinate the employment of the offending servant may be. The real effect of the rule is to make any servant of the company who is charged with the performance of any duty which the company owes its servants a vice principal in respect to such duty. The case of Schultz v. C., M. & St. P. R. Co., 48 Wis. 375, affords an apt illustration of an application of this rule.

In the Howland case the company was held not liable for the negligence of the conductor, who for many purposes is held to stand for the company, and who had control of the plaintiff, because the alleged negligent act did not pertain to a matter in respect to which the company owed a direct duty to plaintiff. For that reason the conductor and his subordinate employe—the plaintiff—were held to be fellow-servants engaged in a common undertaking, and the company was held not liable for the negligence of the former which resulted in injury to the latter. The same doctrine is adhered to in Toner v. C., M. & St. P. R. Co., 69 Wis. 188, and in numerous other cases in this court, some of which are cited in the opinion in the Toner case. Whatever may be thought of the reason or justice of the rule, it is now too deeply imbedded in our jurisprudence to be repudiated or shaken by judicial determination. If any change of the rule is desirable, it should be made by the legislature—not by the courts.

The question here under consideration was not reached on the appeal in the first action for the alleged injury, and there is no significance in the circumstance that the court there gave no opinion upon it, but expressly declined to do so. In this case there is no direct averment in the complaint that the express company was negligent, or that Colvin was incompetent to drive the team, or that the company failed in any duty it owed plaintiff. It simply alleges facts which show that Colvin chose to drive the team, as he had undoubted authority to do, instead of allowing plaintiff or some other employe of the company to drive it, and that he drove it so negligently that the plaintiff was thereby injured. Under the above rule, these averments show that Colvin and plaintiff were fellow-servants in the particular business in which they were engaged, and hence that the company is not liable for the negligence of Colvin.

It results from the foregoing views that the complaint fails to state a cause of action against the express company, and that the demurrer thereto should have been sustained.

By the Court.—The order overruling the demurrer to the complaint is reversed, and the circuit court directed to sustain such demurrer.

(c) DUTY OF THE EMPLOYER TO PROVIDE SAFE PREMISES AND SUITABLE APPLIANCES. ALSO ASSUMPTION OF RISK BY EMPLOYE.

FIFIELD v. NORTHERN RAILROAD.

1860. SUPREME JUDICIAL COURT OF NEW HAMPSHIRE.
42 N. H. 225.

CASE.—The defendants demurred to the declaration, which was as follows:

In a plea of the case for that the defendants heretofore, to wit, on the tenth day of February, 1859, owned, occupied, and possessed of a certain railroad called the Northern Railroad, running from Concord, in the county of Merrimack and state of New Hampshire, to a place called West Lebanon, in the town of Lebanon, in the county of Grafton, which railroad runs through the town of Canaan, in said county of Grafton, and the defendants, at the time aforesaid, operated said railroad by running their cars and engines on and along said railroad from said Concord to said West Lebanon, and had the management, control and direction thereof, and the engines and cars on the same, and the plaintiff was at said time in the employ of the defendants as a brakeman upon a freight train of said road of the defendants, and employed by the defendants for that purpose; by reason whereof it became and was the business and duty of the plaintiff to attend to the brakes upon the train or trains of the defendants upon which he was, and it was also his duty to assist in setting out cars from said train or trains, and in taking into said train or trains such cars as it was necessary to take in, or set off, by shackling or hitching, unshackling or unhitching the cars, as might be necessary, or as he might be ordered to do by the superintendent, or other officer of said railroad; and it was the duty of the defendants to keep said road in good and sufficient repair, and the track so cleared from snow, ice, and other impediments, and the engines and cars used and drawn thereon in good and sufficient order, so that their servants and men employed in making up, running, managing and controlling their said trains upon said road, could, with ordinary care and prudence, do and perform their said duties in, upon, and about said engines and cars, and about the said railroad with safety; yet the defendants, not regarding their said duty in these respects, negligently and carelessly allowed and suffered their said road, to wit, at said Canaan, on the day and year aforesaid, to become filled and blocked up with snow and ice on the side and sides of said road and tracks, and then and there negligently and carelessly suffered a certain freight car to be and remain out of repair, by reason of which negligence and carelessness of the defendants in permitting the said road to become so filled and blocked

up with snow and ice as aforesaid, and so carelessly and negligently permitting the said car to be so out of order, as aforesaid, the plaintiff, while in the performance of his duty as by his said employment by and with the defendants as brakeman on said train or trains, in shackling and unshackling said cars at said Canaan, heretofore, to wit, on the said tenth day of February, and while in the exercise of great care and prudence on his part, was unavoidably caught between the said cars, and run against and upon by the said cars, whereby the plaintiff's arm was broken, and he was so otherwise cut, bruised and wounded that he became and was very weak, sick, sore and disordered, and so remained and continued for a long space of time, to wit, from thence hitherto, and still so continues, during all which time the said plaintiff suffered great pain, and has been wholly prevented and hindered from performing any business whatever during that time, and deprived thereby from earning a support for himself and family, and so now continues; and also by means of the premises the plaintiff was forced to pay, lay out and expend, and has necessarily paid, laid out and expended divers large sums of money, in all amounting to a large sum of money, to wit, the sum of five hundred dollars, in and about endeavoring to be healed and cured of his wounds, hurts and bruises occasioned as aforesaid; to the damage of said plaintiff, as he says, the sum of five thousand dollars.

Doe, J.—The gist of the declaration is, that by reason of the defendant corporation negligently permitting its road to be blocked with snow and ice and a car to be out of repair, the plaintiff, a servant of the defendants, employed as a brakeman, was injured.

If the railroad were owned by one individual, and he should personally assume the duty of examining and repairing the road and the cars, and through his negligence in not repairing, or in imperfectly repairing them, a brakeman employed by him should be injured, the employer would be liable. And if the employer did not attend to the repairs himself, and if ordinary care and prudence required that one or more persons should be constantly engaged in making repairs, and the employer, through gross negligence, did not employ any, or a sufficient number of repair-men, or negligently employed unskilful ones, and a brakeman, not knowing this fact, and being in no fault for not knowing it, and being chargeable with no negligence or fault whatever, were injured, solely in consequence of such negligence of his employer, the employer would be liable. In such case, the master would be held responsible for the exercise of ordinary care and prudence. If he assumed to do any part of the work himself, he should exercise ordinary care and skill in doing it; if he did nothing personally, except hiring all the servants, he should exercise ordinary care in employing a sufficient number of competent servants. And a declaration alleging that he carelessly and negligently permitted the track and a car to become and remain defective

would be sustained by evidence that they became and remained defective through his personal carelessness and negligence in not discovering and remedying the defects, if he took upon himself that branch of the business; or by evidence that he assumed the general management and superintendence of the road, and employed all the workmen, and that from gross negligence he employed no repair-men, or an insufficient number, or unskilful ones, whereby the track and a car became and remained defective. In either case, the defects would exist by reason of his own negligence. Whether his negligence consisted in not discovering or in not removing the defects himself, or in not employing any or a sufficient number of repair-men, or competent ones, the action could be founded upon his personal negligence, and the allegation that the defect existed by reason of his negligence would be sufficient.

The same general rules must be applicable, whether the owner of the road and employer of the workmen is a person or a corporation. The agents of a corporation must have a principal, and its servants must have a master; and the mutual duties and liabilities between master and servant must be the same, whether the master is a man, or a being existing only in contemplation of law. In the present case, ordinary care and prudence may have required that workmen should have been employed to repair the cars, and to remove the snow and ice from the track, and the stockholders may have voted not to employ such workmen, or to employ a number known to be insufficient, or those known to be incompetent, and the plaintiff, in the exercise of reasonable care, and without any knowledge, or means of knowledge of defects in the car or track, or of the insufficiency or incompetency of the repair-men, may have been injured in consequence of the action of the stockholders. In such case, although the stockholders, for many purposes, are not the corporation, it would not, probably, be denied that the plaintiff, being injured by the gross negligence of the controlling power of the corporation, could maintain this action. The declaration must, therefore, be held sufficient.

It is understood that the powers and duties of the directors are such that, in the general management of the business of the corporation, their negligence may be called the negligence of the corporation, in contradistinction to the negligence of its servants. Whether any other officers occupy a similar position in relation to the corporation and its servants, cannot now be decided. King v. B. & W. Railroad, 9 Cush. 42; C., C. & Cin. Railroad v. Keary, 3 Ohio (St.) 201.

The rule is very generally established that a servant who is injured by the negligence of a fellow-servant in the course of their common employment, without any fault on the part of the master, can maintain no action against the master for such injury. The rule appears to be founded on the implied contract that he who engages in the employment of another for the performance of specified duties

and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, the compensation, in legal presumption, being adjusted accordingly; and it is said that perils arising from the negligence of fellow servants are incident to the service. Farwell v. B. & W. Railroad, 4 Met. 49.

The contract between master and servant, for many if not for all purposes is, that each will exercise ordinary and reasonable care. If an individual is the sole owner of a railroad, and also general manager, purchaser and superintendent, he is presumed to engage with his workmen that he will use ordinary care in furnishing them with engines, cars and road, in a condition reasonably safe, and if, from any defect in the engines, cars or road, which ordinary care on the part of the owner personally would have prevented or cured, a brakeman, in the exercise of ordinary care, having no knowledge or means of knowledge of the defect, is injured, the owner is liable. But it would be unreasonable to imply a contract of warranty, on the part of the owner, that the engines, cars and road should be sufficient and free from defect. And it is claimed that it would be equally unreasonable to imply a contract of warranty on the part of the owner with each of the workmen that all the other workmen should be competent and free and from fault, and that the only reasonable and consistent contract that can be implied on this point is that the owner will exercise ordinary care in employing competent workmen. If such owner hires an engine and engineer, and a brakeman is injured at one time by a defect in the engine, and at another time by the fault of the engineer, it might be difficult to imply a contract on the part of the owner to use ordinary care in hiring a suitable engine, and a contract of warranty that he would hire a suitable engineer, and that the engineer should not only be reasonably competent, but that he should never be negligent.

It has been held substantially that whether a workman is injured through inadequacy of machinery, or other aids or means furnished by his master, or through incompetency or carelessness of fellow-workmen, his right of action against his employer stands upon the same ground; that between master and servant the implied contract is that each will use ordinary care in all things pertaining to the servant's business; that if a master exercises ordinary care in hiring and retaining in his employment a competent engineer, and in buying and continuing to use a suitable engine, the master should no more be liable to a brakeman, if the engineer should prove to be incompetent, or being generally competent should on some occasion be careless, than if the engine, apparently sufficient, should explode; that the master has performed his contract with the brakeman, so far as it relates to the engine and engineer, when he has done all that ordinary care requires him to do to secure an engine and engineer reasonably suitable for the business. If the owner of

a railroad, being a person of ordinary care, should select his servants with reasonable circumspection, and ride upon the road himself, he would take as much care of his brakeman as of himself, so far as their safety depended upon the other servants; and the brakeman, who would charge the owner with greater obligations, should establish his claim upon strong and satisfactory grounds of reason, justice, public policy, or probability as to the actual intention and understanding of the parties in making the contract of service.

The law on this subject is not peculiar to common carriers, railroads, or extensive enterprises. The responsibilities of the defendants, in this case, and of the individual who hires two laborers in harvest, or two carpenters to erect a staging and shingle his house, are to be determined by the same legal tests. This case is between master and servant, and is to be carefully distinguished from a case between common carrier and passenger, as there may be no foundation in the former for the peculiar principles applicable in the latter. Bailees are held to different degrees of care in different kinds of bailment, as between themselves and the other parties to the contract of bailment; but all bailees, as between themselves and their servants, must be held to a degree of care fixed by a general and uniform rule. The business in which the master is engaged is immaterial.

If the employer's contract with his workmen is, that he will use ordinary care in the employment of other workmen, but that he will not guarantee their carefulness, and if he use such care, and, by the negligence of one of them another of them is injured, the employer is not liable, the common rule of torts, that the act of the servant is the act of the master, being suspended as to that case by the contract. But if a third person, not a party to the contract between the master and servant, is injured by the fault of the servant, his right of action against the master does not depend upon, and is not limited by that contract. The servant has agreed to bear, and is paid for bearing the risks incident to the service; the stranger has not made such an agreement, and is not paid for bearing such risks.

And if the contract, implied on the part of the servant, is to bear the risks only of the business in which he is engaged, and not the risks of other business, he would not be prevented by his contract from maintaining an action against the master, if he were injured by the negligence of another servant of the same master, engaged in other business. His remedy would be restricted by the contract only as to the negligence of fellow-servants engaged in the same general service, or those employed in the conduct of one common enterprise or undertaking, or those whose employment is such that, by their negligence in the usual line of their duty, he might reasonably expect to be endangered, or those whose negligence might be understood to be incident to his service.

There being an express agreement between the master and serv-

ant to do certain work and to pay for that work, but no express agreement as to the care to be exercised, the liabilities to be assumed, or the risks to be borne by either, the most reasonable contract to be implied on those subjects. The servant is supposed to undertake that he will exercise reasonable and ordinary care in doing the work; and he is liable, if, from the want of such care on his part, any damage result to the person or property of the master, and the damage could not have been avoided by ordinary care on the part of the master. And if the servant receives an injury which such care on his part would have avoided, he has no remedy against the master, although the master may also have been in fault. And if the servant knows that a certain part of the work is to be done by other servants, and the master is required to use ordinary care in employing them, the obligations of master and servant, as between themselves, in everything done by each of them in relation to the servant's business, would be reciprocal and equal.

A contract is implied, on the part of the servant, that he assumes the apparent risks, as well as those generally incident and ordinarily and reasonably to be expected in the service. Assop v. Yates, 2 H. & N. 768. He engages to bear the special perils which he knows actually to exist in his particular service, as well as the dangers generally appertaining to such business. If an engineer undertakes to run an engine which he knows to be defective and peculiarly liable to burst, he has no remedy for an explosion to which he voluntarily exposes himself. If he would have the visible or known risks borne by his employer, he should insist upon an express stipulation to that effect in the contract; no such stipulation can reasonably be inferred. And if the servant takes the risks of known defects of machinery, it would seem that he also assumes, to some extent, the risks of known incompetency and insufficiency of fellow-servants. Skipp v. E. C. R. Co., 9 W. H. & G. 223.

In the present state of this case we are not called upon to determine what rule, as to the liability of a master to a servant, for the negligence of a fellow-servant, is the law of this state, as the defendants may be made liable without raising that question. And whether it should have been alleged in the declaration that it was the duty of the defendants to use and exercise ordinary and reasonable care and diligence, to keep the said road and car in reasonably good and sufficient repair, etc., and that the defendants did not use and exercise ordinary and reasonable care and diligence to keep, etc., but negligently and carelessly allowed and suffered, etc., is a question not argued by counsel or considered by the court. Similar allegations, in the leading case of Priestly v. Fowler, 3 M. & W. 1, were held insufficient upon grounds which are not satisfactory to us. It was there said that if the owner of a carriage is responsible to his servant for the sufficiency of the carriage, he is responsible to the servant, also, for the negligence of his coach-maker,

or his harness-maker, or his coachman, and that the mere relation of master and servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. But the declaration in that case was, not that the defendant insured the plaintiff against injury from all defects in the carriage, but that it became the duty of the defendant, on that occasion, to use due and proper care that the said carriage should be in a proper state of repair. The declaration seems to have been considered as setting forth a right of action growing out of a contract of warranty; whereas, in fact, it alleged substantially that from the relation of master and servant, there was to be implied, on the part of the master, a contract to use due and proper care. If the implied contract were that the master should use ordinary care in procuring a suitable carriage and suitable fellow-servants for the plaintiff, the inconvenient and absurd consequences which the decision in that case seem to have been intended to avoid, would not have resulted from holding the declaration sufficient. The terms "ordinary and reasonable care and diligence," have an exactly defined meaning in law, and perhaps they should be used in declarations of this kind.

Demurrer overruled.[1]

PENNA. & N. Y. CANAL AND R. R. CO v. MASON.

SAME v. LESLIE.

1885. Supreme Court of Pennsylvania. 109 Pa. St. 296.

These were two actions of trespass on the case, brought by Anna Mason and Sarah Leslie against the Pennsylvania & New York Canal and Railroad Company to recover damages for the deaths of their respective husbands, Frank Mason and John Leslie, caused by the alleged negligence of the defendant company. The defendant pleaded not guilty.

On the respective trials in the court below, before Morrow, P. J., the facts appeared to be substantially the same in both cases and were as follows:

[1] See Pressed Steel Car Co. v. Herath, 110 Ill. App. 596.

If servants in the scope of their employment are required to go upon premises not owned by the master, the latter must use due care to have such premises safe. Harding v. Railway Transf. Co., 80 Minn. 504. On page 506, Start, C. J., said: "It is no answer to this proposition to say that the defendant did not control the track and steps; for, if its right to use them in the work of putting in and taking out cars for the mill company did not carry with it the implied right to keep the premises safe for its employes, it was bound to see that the mill company did so, or decline to use them."

John Leslie and Frank Mason were employes of the defendant company, the former as engineer, and the latter as fireman, of the locomotive "Wyoming." On April 26, 1880, they were both killed by the sudden explosion of the boiler of this locomotive, while they were operating it in the course of the company's business. The locomotive was originally built by the Baldwin Locomotive Works in 1860, and had been in the use of the defendant since that time. In 1877 it had been taken to the defendant's repair shops at Sayre and inspected, repaired and tested. Shortly before the accident it had again been taken to these shops and repaired and re-tested by the practical machinists who were in the employ of the company. These employes were under the direction of J. N. Weaver, the master machinist of the company. Weaver testified that he also had the engineers and firemen employed by the company "under my control; that is, so far as the care of the engines was concerned. I had nothing to do with them on the road. I directed what engines they were to run on." He further testified that he directed what engines should go out and assigned the engineers to run them, that he had exclusive charge of such assignments; that he arranged all promotions and made such changes as he thought necessary. The evidence as to the cause of the accident was conflicting. There was some testimony tending to show that the accident was due to the negligence of Leslie; other witnesses testified that the boiler was defective in its original construction and insufficiently repaired, and that by reason of these defects it was unfit for use. The court submitted these questions to the jury for their determination.

The plaintiff submitted the following point: 1. That the defendant company was bound to keep and maintain the engine "Wyoming" in such condition as to be reasonably and adequately safe for Mason (Leslie), the deceased, to be upon and use, and if the jury believe the death of Mason (Leslie), was caused by the negligence of the defendant in failing to keep and maintain the said engine in such reasonably and adequately safe condition, the plaintiffs are entitled to recover.

Answer: This is affirmed.

The defendant submitted the following point in the case brought by Anna Mason:

3. That the workmen in the shop at Sayre who repaired this boiler were fellow-servants under the evidence in this case with Frank Mason, and the plaintiff cannot recover if the explosion was caused by their negligence, either in inspecting or repairing the boiler.

Answer: That is denied. It is true that Mr. Weaver testified that he had under him Slowey, who made these repairs, and he also had under him the engineer and fireman of the gravel train; and, as Slowey repaired this engine by his direction, it is claimed on the part of the defendant that because they were all under Weaver,

therefore they were fellow-servants, and that if the engine was not reasonably, carefully and well repaired, the plaintiff cannot recover, because Slowey and Mason were fellow-servants. I do not think it follows, necessarily, because Weaver swears that he is the master mechanic of the shop, and I think that whatever was done under him would bind the defendant.

Verdict in each case for the plaintiff therein, and judgment thereon. The defendant took these writs of error, assigning for error, *inter alia,* the action of the court in affirming plaintiffs' point, and in qualifying defendants' point. The cases were argued together in the supreme court.

Mr. Justice Gordon delivered the opinion of the court May 25, 1885.

On the 26th day of April, 1880, in consequence of the explosion of a locomotive boiler belonging to defendant below, John Leslie, the engineer, was killed outright, and Frank Mason, the fireman, was so injured that he died on the 4th of May following, and these actions were brought by their widows severally for damages resulting to them from the death of their respective husbands. As these actions are in all respects similar, they were, in this court, argued together, and for this reason we will dispose of both in the same opinion.

Certain questions which arose in the court below have been settled by the verdict; among others, the insufficiency of the boiler for the work it was intended to do, and the fact that Leslie and Mason did not by any act of commission or omission contribute to the accident. There were also certain legal principles recognized by the court below, about which there was and can be no serious dispute, as that the burthen of proof was on the plaintiffs to show negligence on the part of the defendant or its agents; that there could be no recovery if the accident resulted from the negligence of a fellow-servant; that this master was bound to furnish safe appliances and tools with which its servants might accomplish the work they were required to do, and that it could not be held liable if competent and careful mechanics were employed in the manufacture and repair of the boiler. In all these particulars the court properly instructed the jury, and they would seem to cover the entire case. Nevertheless we have some assignments of error founded on exceptions taken to the rulings of that court.

We are told that it was a mistake for the learned judge to affirm the plaintiffs' first point because of its containing the word "adequately" as follows: "That the defendant company was bound to keep and maintain the engine 'Wyoming' in such a condition as to be reasonably and adequately safe for Mason, the deceased, to be upon and use." But as, according to Webster, 'adequacy' means simply 'sufficiency; sufficiency for a particular purpose,' we cannot

see wherein this instruction there was error. The boiler ought to have been sufficient for the purpose intended, and if it was not the company was responsible for the absence of such sufficiency; indeed, in this alone the neglect, if any, is found. But the court below was asked by the counsel for the defendant to say that the workmen in the shop at Sayre, who repaired the boiler, were, under the evidence, fellow-servants with Leslie and Mason, and that there could be no recovery for the negligence of such co-employes. To this the court made answer as follows: "That is denied. It is true that Mr. Weaver testified that he had under him Slowey, who made these repairs, and he had also under him the engineer and fireman of the gravel train; and as Slowey repaired this engine by his direction, it is claimed on the part of defendant that because they were all under Weaver, therefore they were fellow-servants, and that if the engine was not reasonably, carefully and well repaired, the plaintiff cannot recover, because Slowey and Mason were fellow-servants. I do not think it follows necessarily, because Weaver swears that he is the master mechanic of the shop, and I think that whatever was done under him would bind the defendant." We think this answer accords with the general tenor of our Pennsylvania decisions, and unless we propose a new departure, and conclude that the servant is to have no protection whatever from the carelessness of his master, we must support this ruling of the court below. How a boiler-maker employed in a machine shop can be regarded as a co-employe with a fireman and engineer engaged in running a locomotive on a railroad, in the sense of making the latter responsible for the negligence of the former, is something that is difficult to understand. The only possible connecting link between them was the superintendent, Weaver, but as he stood in the place of the defendant company in the department over which he was placed, he is not to be regarded as an employe but as a principal: Mullan v. The Steamship Company, 28 P. F. S. 25. What business had Leslie and Mason in or about the company's machine shop any more than they had about the shop of any other firm or individual? The boiler was condemned as unfit for use, and was taken from these men for the purposes of repair, and afterwards, when it was supposed to have been made safe, it was returned to them and they were required to use it as a machine fit for the intended purposes. The fact was, as the jury found, it was not safe, and not fit for the use to which it was put; it blew up, and destroyed the lives of the men who had charge of it, and the question now is, upon whom is the blame to rest if not on the master? And how are Leslie and Mason to be charged with the negligence of men with whom they had not the remotest practical connection?

Are we to strain a point against these laborers and raise a theoretical connection between them and the boilermaker in order to shift the responsibility from the master to the servant? Neither on

disposition nor authority can we approve a proposition so clearly wrong as this. Says Dr. Wharton in his work on Negligence, section 232: "A master is bound when employing a servant to provide for the servant a safe working place and machinery. It may be that the person by whom buildings and machinery are constructed, are servants of the common master, but this does not relieve him from his obligation to make buildings and machinery adequate for working use. Were it otherwise, the duty before us, one of the most important of those owed by capitol to labor, could be evaded by capitalists employing their own servants in the construction of buildings and machinery. In point of fact, this is the case with most great industrial agencies, but in no case has this been held to relieve the master from the duty of furnishing to his employes, material, machinery, and structures, adequately safe for their work." The learned author, in support of what he thus propounds, cites, among others, the case of Ford v. Fitchburg Railroad Company, 110 Mass. 240. A case very much like the one in hand, and in which the duties of the master to his servants are well and ably stated by Mr. Justice Colt. It is there, as in many other cases, held, that the legal rule which exempts the master from responsibility for accident resulting to those in his employ, or from those occurring through neglect of co-laborers, does not excuse him from the exercise of reasonable care in supplying and maintaining suitable implements for the performance of the work required. Nor are those agents who are charged with the business of supplying the necessary machinery, to be regarded as fellow-servants, but rather as charged with the duty which the master owes to the servant, and the neglect of such agent is to be regarded as the neglect of the master. So is the employer equally chargeable whether the failure is found in the original tool, or machine or in a subsequent want of repair by which it becomes dangerous. There can, indeed, be no essential difference in these particulars, and the only question is, whether the defect from which the accident arose, was known, or might, by the exercise of reasonable diligence, have been known to the master or his agents.

What has been above stated accords, we think, with the general tenor of our own authorities, and among others O'Donnel v. The Railroad Company, 9 P. F. S. 241. We must, therefore, refuse to sustain the exceptions of the plaintiffs in error, and approve the rulings of the court below.

Judgment in each case affirmed.[1]

[1] "As between the employers and employed, it is unquestionably the duty of a railroad company to provide a track and equipments which shall be reasonably safe; but this does not oblige the company to make use of the latest improvements, or to change the structures upon its road so as to conform to the most recent or advanced improvements and ideas upon such subjects." Sherwood, J., in Illick v. Flint, etc., R. R. Co., 67 Mich. 632, 637.

"We think it may be laid down as a legal principle that in all occupations

KNOX v. PIONEER COAL CO.

1891. Supreme Court of Tennessee. 90 Tenn. 546.

Snodgrass, J.—Plaintiff was injured while aiding Shannon, another employe of the defendant company, to prop an entry in defendant's mine, where plaintiff was digging coal.

It was not his business to prop the mine. While Shannon, whose duty it was to prop it, was thus engaged, he asked plaintiff to help him. Plaintiff left the place where he was at work and went to do so. A large piece of slate fell on his thumb and mashed it while he was so aiding Shannon. He sued for $1,000; lost, and appealed.

If it was his duty to do this repairing, he cannot recover, because the danger of it would be the object for which he was employed, and was one assumed. If it was not his duty, and he was ordered to do it by one not authorized to command him, the company would not be liable. Railroad Company v. McDaniel, 12 Lea 386. See also 14 Lea 374.

Accepting the invitation or obeying the order of one not authorized to command him, and voluntarily placing himself in the dangerous position where he was hurt, gave him no right of action against the company.

The company had been negligent in suffering the mine to get in a dangerous condition, and allowing it to remain so, and had plaintiff's injury been occasioned by that negligence while he was in the line of his duty in passing under the loose slate the company would have been liable; but it is not so when such negligence did not proximately cause the injury, but the same was caused by the voluntary

which are attended with great and unusual danger there must be used all appliances readily attainable known to science for the prevention of accidents, and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence." Field, J., in Mather v. Rillston, 156 U. S. 391, 399.

"It is well settled that among the legal obligations of a master to his servant, forming a part of the implied contract between them, is that of making reasonable provision to protect the servant against dangers to which he is exposed while conducting the work he is employed to do, and of supplying a sufficient number of servants to effect the work with reasonable and ordinary safety to those engaged in performing it; and if the proximate cause of an injury sustained by the servant while so engaged is the failure of the master to exercise ordinary prudence in this respect, the master is liable, unless the servant may fairly be regarded as having assumed the risk incident thereto. The failure of the master in this respect stands upon the same footing as the failure to supply suitable and sufficient machinery or appliances for conducting the work safely." Simmons, J., in Cheeney v. Ocean Steamship Co., 92 Ga. 726, 728.

BOOK V. PIONEER LIFE

CHAPTER XXXIII. STRIKING IT RICH

act of plaintiff in placing himself under it to aid another servant of the company at his request.

Let the judgment be affirmed with cost.[1]

THE ISLAND COAL COMPANY v. GREENWOOD.

1898. Supreme Court of Indiana. 151 Ind. 476.

Howard, C. J.—Appellee was employed by the appellant company in mining coal, and has brought this action to recover damages for injuries alleged to have been caused by the negligence of the company in suffering coal to fall upon him from the roof of the mine in which he was at work. The jury returned a general verdict in favor of appellee, assessing his damages at $4,500. They also returned answers to interrogatories. The questions discussed by counsel may best be considered in connection with the action of the court in refusing to give judgment to appellant on these answers to interrogatories, notwithstanding the general verdict. From the answers to interrogatories it appears: That on the 16th day of October, 1895, and previous thereto, the appellant company was engaged in mining coal near Linton, in Greene county; that on said day, and for more than a year before, appellee was employed in the company's mine known as No. 2, his business being to run a cutting machine, in which work he was assisted by one Sherwood; that there were a number of openings in the mine called work rooms, each connected with a passage way, or entry, the rooms being from twenty to twenty-six feet in width; that after a room was started at a given width it was usual for the miners to work at the face of the vein, that is, at the end of the room farthest from the entry; that the vein of coal being mined on said 16th of October, 1895, was about five feet in thickness; that it was mined by the men operating the machine by

[1] "The law governing the relation of master and servant assumes freedom of contract between them. Much of the world's work is dangerous, and it could hardly be carried on successfully unless those who were employed in it should be held to assume the dangers that were incident to it, or which were known, or so obvious as that they ought to be known, by one entering the employment. Latent or concealed dangers known to the master, or which he ought to have known, must be explained by him to the servant." Gray, Cir. J., in Bethlehem Iron Co. v. Weiss, 100 Fed. Rep. 45, 49.

"This doctrine (assumption of risk) pre-supposes that the servant has sufficient discretion to appreciate the dangers incident to the work, and has no application to the case of young and inexperienced children. In such a case it is the duty of the master not only to warn the child, but to instruct him as to the dangers of the employment and the means of avoiding them." Searls, C., in Fisk v. Cent. Pac. R. R., 72 Cal. 38, 43.

The doctrine of assumption of risk applies to a domestic servant. Herold v. Pfister, 92 Wis. 417.

cutting away a part of the lower edge of the vein across the whole face of the room, preparatory to blasting; that after the machine men had done their work, other miners, called loaders, drilled holes in the face of the coal which had been so cut under, into which holes blasting powder was inserted, and thereby masses of coal were thrown down and broken up; that while the loaders were blasting coal in one room and removing it from the mine, the machine men were at work in another room; three loaders, in this case, following the two machine men; that it was the business of the loaders to clear up a room after a blast and before any further cutting was done in it; that appellee was hurt in a room known as No. 8 in the ninth entry east of the south main entry, his injury being caused by top coal and slate falling upon him from the roof of the room; that on the 16th day of October, 1895, the day on which appellee was hurt, and for several days prior thereto, one Newport was appellant's mine boss; that said mine boss visited room eight on the 14th day of October, 1895, and then found top coal adhering to the roof of said room, extending across the end of the room next to the face of the coal, and being about eleven feet wide on the right hand side of the room, and three and a half inches thick; that the mine boss sounded this top coal and found it loose at the point where he sounded it; that the mine boss then directed one of the loaders to take down the top coal, and before the accident occurred the loaders did take down a part thereof; that the part taken down began at the left side of the room, and the loaders took down all that was loose; that the mine boss again visited the room on the morning of October 16th, the day of the accident to appellee, and then saw that a part of the top coal had not been taken down; that about three-quarters of an hour after the mine boss left room eight, on the morning in question, appellee and his assistant brought in their cutting machine, and both noticed that a part of the top coal had not been taken down; that appellee then sounded said top coal by striking it with a pick to discover whether it was loose and likely to fall down, but upon such sounding the coal appeared to be firm, and to adhere closely to the roof of the room; that appellee's assistant, Sherwood, sounded the top coal in like manner with the handle of a shovel, and also found it firm and adhering tightly to the roof; that thereupon appellee and his assistant placed their machine and began to cut the side of the room under said top coal, and after they had been at work for an hour and a half the top coal fell upon them; that the weight of the coal that came down was about 800 pounds, being all of the coal that adhered to the roof when they began cutting, and it fell a distance of two feet and a half; that miners determine whether top coal, or other material adhering to the roof of a room, is likely to fall by striking it and listening to the sound; if such material is loose it will give forth a hollow sound on being so struck; no other method is shown for determining whether top coal is loose; that there is

always more or less danger of top coal falling from the roof of a mine, and no one can determine by examination when it will fall; that appellee and his assistant, while running a cutting machine in appellant's mine, had eight different working rooms, and changed from one to another, going to a room which the loaders had made ready; that rooms were often shot, cleaned up by the loaders, and again entered by the machine men between the regular visits of the mine boss; that appellee and his assistant, Sherwood, when they went to work in a room often found top coal adhering to the roof which the loaders had not taken down, and it was their custom on those occasions to test the condition of such top coal by sounding the same, and thus determining whether it was safe to work under; that on this occasion Sherwood sounded said coal all over its surface, and the coal sounded solid and safe, both when appellee sounded it and when it was sounded by Sherwood; that the pick used by appellee was the best thing for sounding top coal, and the shovel handle used by Sherwood was a good implement for that purpose, either being better than the implement used by the mine boss in sounding on the 14th of October, 1895; that to judge of the safety of the top coal no one could do more than listen to the sound when it was struck; that appellee and Sherwood had good hearing when they sounded the top coal in room eight, and both heard the sound given forth when it was struck by the pick and the shovel handle; that the condition of room eight when appellee and Sherwood entered it on the morning of the accident was open to their observation, but they did not observe its condition closely or sound the top coal over its whole surface; that the reason why top coal was often found adhering to the roofs of rooms in which appellee and Sherwood worked was because the entire vein did not always come down when the blast was fired; that Newport, the mine boss, had general charge of the safety of entries, rooms, and other places where employes or others had occasion to go in appellant's mine; that, in the course of the work in mining coal, that part of the room where work was actually done often became unsafe by reason of the manner in which such work was done, and the loaders often remedied the trouble which caused danger by removing the top coal; that such dangers often arose and were remedied between the visits of the mine boss, and without his suggestion; that appellee had been a coal miner, a part of the time, for eleven years before the accident, and Newport had then been mine boss for about ten days; that there was space in room eight to the north and west of where the top coal that fell on appellee was adhering to the roof, in which they might have worked their machine on the morning of the accident; but it was necessary for them to operate the machine under the overhanging coal; that the appellee placed his machine under the top coal, knowing that such top coal was there, in room eight, at the time he so placed his machine, and

began work thereunder, because of the fact that he had sounded such top coal and believed it to be absolutely safe and free from danger.

It is not contended that these facts show contributory negligence on the part of appellee; but counsel for appellant do contend that the facts so found show that appellee assumed all risk of danger from the falling of the top coal. Counsel for appellee, on the other hand, contend that the danger was not obvious but concealed or latent, and that as to such danger there is no assumption of risk. It is true that the danger was concealed, but it was concealed from appellant as well as from appellee. And while the duty of inspection rested upon the company, and it was required to furnish a reasonably safe place for its employes to work, yet we think the facts show that the duty so resting upon appellant was performed as fully as was reasonably possible. It is to be remembered that the defect in the roof was not in the passage way of the mine, but in the very place where appellee was at work, and of which he had a fuller and more complete knowledge than appellant could have. The cause of danger was in the immediate presence of appellee, and had been thoroughly tested by him and his assistant; and, on such test, the place was found by them to be, as they believed, perfectly safe. They often found such top coal adhering to the roof when they entered a room to work, and were in the habit of testing it, as they did on this occasion. The jury found that there is always more or less danger of such coal falling, and that no one can tell by any examination when it will fall. It was also found that such dangers often occur and the top coal is removed between the visits of the mine boss, and without his suggestion. No doubt, as to permanent openings through which persons pass and repass in the mine, it is the duty of the mine owner, made so by the common law as well as the statute, to see that the mine is safe from all dangers that may be avoided by removing or propping up loose places in the roof. And while the statute (§ 12 of the act approved March 2, 1891, Acts 1891, p. 57, § 7472, Burns' R. S. 1894), makes it also the duty of the mining boss to visit and examine every working place in the mine at least every alternate day and see that the same is properly secured by props or timber, and that safety in all respects is assured, yet these requirements must be taken in a reasonable sense. It cannot be intended that props shall be set up at the very place where the machine men are at work. The men must have room to use their machines and tools, and to engage in the actual work before them. Indeed the fact that the mine boss is not required to be present oftener than every alternate day shows that these props are not to be set up before the workmen have cleared a place for them. It is found that rooms are often shot, cleaned up by the loaders, and again entered by the machine men between the regular visits of the mine boss.

In Louisville, etc., Ry. Co. v. Howell, 147 Ind. 266, an employe was injured by reason of the parting of a coupling pin between two

cars. The employe was at the time standing on the front of the engine holding the shackle bar in his hands, and it was unsuccessfully sought to charge him with having assumed the risk of the danger occasioned by the defective coupling pin. "Had he coupled the cars between which the link was used," said the court in that case, "and thus handled the defective appliance and so had opportunity to observe it, there might be some propriety in holding him accountable for a knowledge of its condition. Employes are rightly held chargeable with knowledge of the condition of the tools and parts of machinery and appliances which they use or with which they come in contact." The same is true of the places in which employes are at work and with which they are in immediate contact. The condition and dangers of such places are liable to change from hour to hour, as the work progresses, and the employe himself has much better means of knowing of such condition and dangers than his employer possibly can have. An important consideration in such cases, as said by the supreme court of Iowa, in Corson v. Coal Hill Co., 101 Iowa 224, 70 N. W. 185, is whether the structure, appliance or instrumentality is one which has been furnished for the work in which the employes are to be engaged, or whether the furnishing and preparation of it is itself part of the work which they are employed to perform. So in Finalyson v. Utica Mining Co., 67 Fed. 507, where an employe was injured by material falling from the roof of a mine, it was held that the rule as to providing a safe place to work did not fully apply to a case where the work consisted in making a dangerous place safe, or in constantly changing the character of the place for safety as the work progressed. The case of falling top coal in such a case as the one before us is not unlike the caving in of a gravel pit, where it has been frequently held by this court that the employe assumes the risk of such a possible danger which is alike open to the observation of employer and employe. Vincennes Water Supply Co. v. White, 124 Ind. 376; Swanson v. City of Lafayette, 134 Ind. 625.

The jury here find that both appellant and appellee knew that a part of the top coal was left adhering to the roof of the place where appellee began work. Appellee found the coal, as he and his assistant believed, to be so fast to the roof as "to be absolutely safe and free from danger." In this it turned out that they were mistaken, whether the defect then existed or was brought about by causes arising after appellee and his assistant had begun their work. Having equal or better opportunities than appellant for knowing the danger threatening him, it would seem that appellee could have no right of action. Were it not for the provisions of the statute above cited, and the failure of the jury to find whether the overhanging coal could be propped or timbered without undue interference with the work, the case would hardly admit of doubt. We are of opinion, however, from a consideration of the whole case as presented, that

justice will best be promoted by granting a new trial, rather than by ordering judgment on the answers to interrogatories. Judgment reversed, with instructions to grant a new trial, and with leave to amend pleadings if desired.[1]

LLOYD v. HANES.

1900. Supreme Court of North Carolina. 126 N. C. 359.

Civil action for damages for personal injury alleged to have been occasioned by the negligence of defendant in permitting a saw used in their factory to remain without guard or screen, or safety appliance used on such machinery, to prevent injury to operatives, tried before Robinson, J., at February term, 1900, of Forsythe Superior Court.

The defendant denied all negligence on their part, and attributed plaintiff's injury to his own carelessness. The plaintiff was the only witness examined. He testified: "I am forty-two years old, and have been box-maker for ten or twelve years. In 1899 I was working for defendants in their shops in Winston. The shop is not joined to the tobacco factory, but is in the factory lot, and is operated by steam generated from the main boiler in the factory. They own the machinery in the shop. I got part of my thumb cut off as I was sizing box timber. The saw came out of the table about one inch above the boards of the table. I was pushing the timber when the saw struck a knot, or gave way, and thrust my hand against the saw and cut off part of my thumb. It was an open saw without hood or screen. I had never seen or knew of a screen or hood operated in this manner before I was hurt. I have since seen such protection and hoods, especially in the factory of Bailey Bros. (Hood here introduced and exhibited to the jury.) They make saws less dangerous. If there had been a screen or hood, and the saw had struck a knot or cross-grain, it could have thrust my hand on the screen and not on the saw. I was required to size the timber down to a 32d of an inch, which was very careful work. I took particular pains to hold the boxing in place. I cannot do the same, or as good work as then. I got $1 per day before I was hurt. I cannot get so much now. I cannot average over 60 cents per day.

"W. H. Woodward in the shop employed me. I never spoke to Hanes about my employment, and never saw either of the Hanes

[1] Contributory negligence and assumption of risk are often confused by the courts. See McKee v. Chicago, etc., Ry. Co., 83 Iowa 616. The question of contributory negligence is for the jury. Amato v. North. Pac. R. Co., 46 Fed. Rep. 561. Where a defect in the premises is plainly observable by an employee, he assumes the risk as a matter of law, and the question is not for the jury. Lindsay v. New York, etc., R. Co., 112 Fed. Rep. 384.

employ or pay the hands in the several departments. There was a manager in each department in the factory, that employed and paid the hands. The bills for lumber were made out to P. H. Hanes & Co."

Cross-examined, plaintiff testified: That he was employed by W. H. Woodward in the box shop, and paid by him. That he never spoke to the defendants about employment or his work, nor did his name appear upon their time book, but his time was kept by W. H. Woodward, who run the box shop, and paid for his labor. That the running of a saw of this kind was dangerous, and that he knew it was dangerous. That his hands were cold the day he was hurt, and he knew it was more dangerous when his hands were cold. That at one time, before his injury, he had a contract to make boxes at Brown & Williamson's factory, similar to W. H. Woodward's contract at defendant's factory. That he employed his own labor, paid his own hands, but they furnished the shop and power to run his saws, but had no control over his hands. That he used a saw similar to the one by which he was injured, without a guard. That he is now working at Taylor Bros.' factory, under a contract, and has a man hired to do his re-sawing, and this man uses a saw without a guard similar to the one on which he was hurt. In the tobacco factories in Winston there are managers of the different departments.

At the close of the plaintiff's evidence, his honor intimated that the plaintiff, on his own evidence, was not entitled to recover:

1. Because his evidence showed that the sawing of box plank was dangerous, and that he knew it was dangerous, and that he had been engaged in similar work ten or twelve years, and knew the character of the work.

2. Because his testimony did not establish any contractual relation between him and defendants.

The plaintiff, from this intimation, submitted to a nonsuit, and appealed to the supreme court.

CLARK, J.—We cannot agree with the defendant's counsel that if an employe operates a machine which is lacking in safety appliances which have come into general use, that this is an "assumption of risk" which releases the employer from liability. That would be simply to hold that if such appliances are not used the defendant is negligent, but if the pressure of circumstances forces some unfortunate man to accept service with such machine it releases the employer. This negatives the liability of the employer by the very fact of his negligence, and that as to the class most needing protection, those whose urgent need compels them to take work wherever they can get it. As was said in Sims v. Lindsay, 122 N. C. 678: "It is not to be held as a matter of law that operatives must decline to work at machines which may be lacking in some of the improvements or safeguards they have seen upon other machines, under pen-

alty of losing all claims for damages from defective machinery. It is the employer, not the employe, who should be fixed with knowledge of defective appliances, and held liable for injuries resulting from their use. It is only where a machine is so grossly or clearly defective that the employe must know of the extra risk, that he can be deemed to have voluntarily and knowingly assumed the risk."

To illustrate—if a railroad company fails to use automatic couplers it is negligence *per se*. Troxler v. R. Co., 124 N. C. 189; Greenlee v. R. Co., 122 N. C. 977. If one should take service upon a railroad not having such appliances, this would not absolve the railroad from liability for its negligence in not using such life and limb-saving device. The doctrine of "assumption of risk" is more reasonable and extends no further than that if a particular machine has become injured or dangerous, and the employe, seeing the danger, does not report its condition, but goes on with his work in disregard of it, he assumes the risk. The difference between "knowledge of the danger" in the first case (absence of safety appliances which should be in use), and "assumption of the risk" (by working without protest at a machine which has become defective and dangerous), is pointed out among many other cases, in a late decision of the House of Lords, Smith v. Baker, App. Cases L. R. (1891) 325, in a discussion of the difference between the maxims "*scienti non fit injuria*" and "*volenti non fit injuria*," the former not being law, for which Lord Halsbury cites Bowen, L. J., in Thomas v. Quartermine, 18 Q. B. D. 685, and Lindley, L. J., in Yarmouth v. France, 19 Q. B. D. 647, 660, and further cites from the latter case that even when an employe reports the defect, if he is told to go on with his work, and does so to avoid dismissal, a jury may properly find that he had not agreed to take the risk, and had not acted voluntarily in the sense of having taken the risk upon himself. Whereupon Lord Halsbury sums up "in order to defeat a plaintiff's right to recover by the maxim relied on (*volenti non fit injuria, anglice,* 'assumption of risk'), the jury ought to be able to affirm that he consented to that particular thing being done which would involve the risk, and consented to take the risk upon himself." This has the weight of practical common sense, no matter from what court it came, but with some, common sense has an added value when it is found in a decision of the House of Lords. The distinction is wide between mere "knowledge of the danger," and "voluntary assumption of the risk."

Besides, "assumption of risk" is a matter of defense, analogous to, and indeed, embraced in, the defense of "contributory negligence," Rittenhouse v. Railroad, 120 N. C. 544, and it is an error to direct a nonsuit. Cox v. Railroad, 123 N. C. 604. The jury, as Lord Halsbury says, must pass upon the question whether the employe voluntarily assumed the risk. It is not enough to show merely that he worked on, knowing the danger.

But the plaintiff, in fact, failed to make out negligence on the part

of the defendants upon the evidence because he failed to show that the safety appliance which he alleges would have prevented the injury was in general use, and, in fact, he shows the contrary. The rule laid down in Witsell v. Railroad, 120 N. C. 557, is not that it is required that the latest improved appliances be provided, but only that "It is negligence not to adopt and use all approved appliances and safeguards which are in general use." This has been approved, Greenlee v. Railroad Co., *supra;* Troxler v. Railroad, *supra,* and in other cases. The intimation that upon the evidence that the plaintiff could not recover was correct, but not for the reason given by the judge.

It is unnecessary, in this view, to consider the other ground assigned that the evidence did not establish any contractual relation between plaintiff and defendants. It may be said, however, that as a general rule the negligence of an independent contractor is not chargeable to his employer. Engle v. Eureka Club, 137 N. Y. 100, 33 Am. St. 692, and note. Affirmed.[1]

THE INDIANAPOLIS & ST. LOUIS RAILWAY v. WATSON.

1887. Supreme Court of Indiana. 114 Ind. 20.

Elliott, J.—Stated in a condensed form, the material allegations of the complaint are these: The appellant maintained a freight yard near the city of Indianapolis, in which there were many tracks and switches used for handling locomotives and cars. On the 15th day of October, 1882, the appellee was in the service of the appellant as a night watchman. His duties as such watchman were to go about and over the yard at all hours of the night, and look after the property of his employer, and to wake up at the proper times its employes. The appellant knew that it was necessary that the watchman should be provided with a light in order that he might properly discharge his duties and at the same time protect himself from danger, yet the appellant refused to provide a light. A day or two after the appellee had been so employed he notified his employer that it was necessary for him to have a light in order to discharge his duties and to protect himself. His employer promised to procure a light for him in a short time, and requested him to continue in the performance of his duties. Relying on this promise, he did continue in the appellant's service, but the light was not provided as promised. On the night of November 1, 1882, he was injured, without any fault on his part, while in the discharge of his duties, and his injury was

[1] See article, "Voluntary Assumption of Risk," by Francis H. Bohlen. 20 Harv. Law Rep., 14-34 and 91-115.

caused by the wrong and negligence of the appellant in failing to provide him with a lantern.

The fourth instruction given by the court reads thus: "The general rule is, that when a servant, before he enters the service, knows it to be hazardous, or voluntarily continues his service, without objection or complaint, when he has such knowledge, he is presumed to contract with reference to the state of things as they are known to him, and if he knows that the continuance of such service exposes him to constant and certain danger, the servant in such cases takes the risk upon himself, and in case he suffers injury thereby, he waives all claims for damages against his master for such injury. As has been said in argument, the master is not required to take better care of his servant than he takes of himself."

Appellant's counsel dissects this instruction, and, seizing on the words "without objection or complaint," assails it as erroneous.

This course cannot be successfully pursued. The instruction must be taken in connection with the others of the series, and cannot be considered as standing alone. An instruction is not to be judged by taking mere fragments dislocated from their proper connections, nor is one instruction to be taken as complete in itself. This instruction must, as is well settled, be taken as an entirety, and in connection with the others referring to the same subject and immediately connected with it. City of Indianapolis v. Gaston, 58 Ind. 224; Deig v. Morehead, 110 Ind. 451.

We must, therefore, take the fourth instruction in connection with that bearing upon the same subject, which is as follows:

"6. To the general rule I have announced in relation to a servant who, with a knowledge of the dangers of the service, continues in it, there is at least this exception, that if a servant knows that his service is dangerous, and that he has not been provided with proper means or implements for the reasonably safe performance of the duties of his employment, and makes complaint to his master, who promises that suitable and proper implements shall be provided him to render his service less dangerous, then such servant may continue in the service a reasonable time, and may recover for an injury sustained by him within such time, if, on account of the master's negligence in failing to supply the means of avoiding danger, the injury results; provided such servant at the time of the injury was not guilty of any negligence which contributed to produce the injury. His care must be also proportioned to the danger; when the one is increased, the other must be also. Yet all that is required is ordinary care under the circumstances of the case. And you must determine from the evidence in the case what would be a reasonable time within which he might continue in the master's service under said promise, if any was made, and, also, what would be ordinary care—that is, such care as an ordinarily prudent and cautious per-

son would exercise under the circumstances of the case. The want of such care is what the law terms negligence."

If these instructions, taken together, express the law, then the appellant has no just cause of complaint, even though the isolated clause which counsel detaches and assails should in itself be regarded as an inaccurate statement of the law. Our conclusion is, that when the instructions are so taken they express the law as favorably to the appellant as it had a right to ask.

The first of these instructions does not assert that those employees who continue in the master's service, "without objection or complaint," do not assume the usual risks of the service. It simply asserts that all who do continue "without objection or complaint" do assume the risks incident to the service; but it by no means asserts that those who do complain and object do not also assume those risks. Possibly, the instruction standing alone may be incomplete, but it cannot be justly said to be erroneous, since it may be true that all who continue in a service without objection do assume the risks as well as those who do make objections. But, however this may be, it is sufficiently evident that the fourth instruction is made complete by the sixth, and there is, therefore, no available error.

The next step takes us into a field of stubborn conflict. There are authorities holding that, where the employee objects to the safety of the appliances furnished him, the employer is liable if the employee is injured while in the employer's service, and within a reasonable time after urging the objection. Union Mfg. Co. v. Morrissey, 22 Am. L. Reg. 574; Thorpe v. Mo. Pacific Ry. Co., 89 Mo. 650, 58 Am. Rep. 120; 2 Thompson Negligence, 1009.

A careful examination of the other authorities relied on by appellee's counsel has satisfied us that they do not decide all that it is asserted that they do.

In Holmes v. Clarke, 6 Hurl. & N. 349, the master neglected to fence a dangerous place, as an act of Parliament required him to do, and a servant was awarded a recovery for injuries caused by this negligence. Leaving out of consideration the element introduced by the positive legislation, although it is by no means clear that the act of Parliament did not exert an important influence, we yet conclude that the case does not sustain appellee's position. Wabash, etc., R. Co. v. Locke, 112 Ind. 404.

This conclusion we rest upon these words of the opinion in the case cited by counsel: "Where machinery is required by an act of Parliament to be protected, so as to guard against danger to persons working it, if a servant enters into the employment when the machinery is in a state of safety, and continues in the service after it has become dangerous in consequence of the protection being decayed or withdrawn, but complains of the want of protection, and the master promises to restore it, but fails to do so, we think he is guilty of negligence, and that if any accident occurs to the servant he is

responsible." The promise of the master formed, it is obvious, an important factor in the case, and exerted a controlling influence on the judgment of the court.

There are some expressions in Greene v. Minneapolis, etc., Ry. Co., 31 Minn. 248, that seem to support the appellee's contention, but the ultimate decision is against him. It was there said: "If the emergencies of a master's business require him temporarily to use defective machinery, we fail to see what right he has in law or natural justice to insist that it shall be done at the risk of the servant and not his own, when, notwithstanding the servant's objection to the condition of the machinery, he has requested or induced him to continue its use under a promise thereafter to repair it." At another place, the court, in speaking of the general rule, asserts that the master is liable where the servant gives notice of the defects and the master "thereupon promises that they shall be remedied."

The utmost that can be deduced from the case under immediate mention is, that the servant may continue in the service a reasonable time after the promise to make the machinery or appliances safe, and that if he is injured within that time he may maintain an action.

The cases of Kroy v. Chicago, etc., R. R. Co., 32 Iowa 357; Greenleaf v. Dubuque, etc., R. R. Co., 33 Iowa 52, Muldowney v. Illinois Central R. R. Co., 39 Iowa 615; Lumley v. Caswell, 47 Iowa 159; and Way v. Illinois Central R. R. Co., 40 Iowa 341, do not, as we understand them, go further than to hold that the master is not liable where the servant continues in his service with notice of its danger, unless he has induced the servant to do so by an express or implied promise. In Way v. Illinois Central R. R. Co., *supra*, it was held error to refuse an instruction containing this clause: "If a brakeman on a railroad knows that the materials with which he works are defective, and continues his work without objecting, and without being induced by his master to believe that a change will be made, he is deemed to have assumed the risks of such defects." This, we think, implies that there must be a promise either in express words or arising by fair implication from the conduct of the master. Going back to the case of Kroy v. Chicago, etc., R. R. Co., *supra*, we find the principle upon which the subsequent decisions rest, for they are all built upon that case. It was there said: "Another important modification of the liability of a master for an injury to an employee, which is sustained by an almost unbroken current of authority in this country and in England, is, that if a servant knows that a fellow-servant is habitually negligent, or that the materials with which he works are defective, and continues his work without objecting, and without being induced by his master to believe that a change will be made, he is deemed to have assumed the risk of such defects." This ruling certainly does not sustain the appellee's contention that if an objection and protest are made the master becomes liable. The case of Snow v. Housatonic R. R. Co., 8 Allen

441, cannot be regarded as in point upon this question, nor can the case of Indiana Car Co. v. Parker, 100 Ind. 181, for both of these cases simply affirm the general rule that it is the duty of the master to provide his servants with a safe working place and with safe machinery and appliances.

In Patterson v. Pittsburgh, etc., R. R. Co., 76 Pa. St. 389, there was an express promise on the part of the master, and that fact gives a controlling force to the decision there made. We are referred to Dr. Wharton's statement that "In this country the exception has been still further extended, and we have gone so far as to hold that a servant does not, by remaining in his master's employ, with knowledge of defects in machinery he is obliged to use, assume the risks attendant on the use of such machinery, if he has notified the employer of such defects, or protested against them, in such a way as to induce a confidence that they will be remedied." Wharton Neg. (1st ed.), § 221.

If it were conceded that this is a correct statement of the law, still, it would not supply a premise for the conclusion that an objection or protest exempts the servant from the general rule that he assumes the risk, for it is implied that something must be done by the master to induce the belief that the defect will be remedied, and it is difficult to conceive what other thing than a promise, express or implied, can be regarded as sufficient to induce such a belief. We find on examining the later edition of Dr. Wharton's book that he adds to what is copied from the earlier edition by counsel these words: "Such confidence being based on the master's engagements, either express or implied," and modifies the statement in other respects. Wharton Negligence (2d ed.), § 220.

This author is, indeed, inclined to condemn the exception to the general rule, even as he states it, for he says: "The only ground on which the exception before us can be justified is, that in the ordinary course of events the employee, supposing the employer has righted matters, goes on with his work without noticing the continuance of the defect. But this reasoning does not apply, as we have seen, to cases where the employee sees that the defect has not been remedied, and yet intelligently and deliberately continues to expose himself to it." Wharton Negligence (2d ed.), § 220.

The rule which we regard as sound in principle and supported by authority may be thus expressed: The employee who continues in the service of his employer after notice of a defect augmenting the danger of the service, assumes the risk as increased by the defect, unless the master expressly or impliedly promises to remedy the defect. The promise of the master is the basis of the exception. If the promise be absent the exception cannot exist. In support of our conclusion we refer to these authorities: Russell v. Tillotson, 140 Mass. 201; Linch v. Sagamore Mnfg. Co., 143 Mass. 206;

Hatt v. Nay, 144 Mass. 186; Buzzell v. Laconia Manfg. Co., 48 Maine 113 (77 Am. Dec. 212, 218, and authorities, n.); Galveston, etc., R. R. Co. v. Drew, 59 Tex. 10 (46 Am. Rep. 261; Webber v. Piper, 38 Hun 353 (33 Alb. L. J. 64); Pennsylvania Co. v. Lynch, 90 Ill. 333; Wood Master and Servant, 21; Beach Cont. Neg. 372.

The rule absolving the servant from the assumption of risks is an exception to the general rule, for the general rule is that the servant does assume all the ordinary risks of the service he enters. There must, therefore, be some ground for the exception, and the only solid ground that can be found is the inducement held out by the agreement of the master. If this be not so, then an employee at his first entrance into service might object and protest, and successfully claim that he was exempt from the perils of the service. Or, if our theory be not sound, a mere complaint or objection might, in effect, overturn the general rule, and this would result in confusion and uncertainty. We can see no way to hold that the servant is exempt from the known risks of his service where there is no express or implied contract on the part of the master, without completely nullifying the general rule. The servant is at liberty to quit the service, and if he remains after knowledge of its danger he assumes the risks, even though he may object or complain, unless he is induced to continue by a promise of the master to remove the cause that augments the danger, since, if this be not true, it must be true that any objection or complaint made at any time will absolve him from the risk, and this conclusion cannot be sustained. As the exception concedes and tries the general rule, it cannot be allowed to destroy it, for if it were allowed to do this, it would cease to be an exception. Sweeney v. Berlin, etc., Co., 101 N. Y. 520.

The evidence in this case, as counsel concede, shows that a lantern was essential to the service the appellee undertook to perform; that, as the appellee knew, without the lantern the act which he was engaged in performing subjected him to great danger, and he was injured while attempting to perform it. Nor does the counsel for the appellant, as we understand his argument, contend that it was not the duty of the company to provide the lantern, nor does he question the authority of the person to whom the appellee made application for one to act for the company in such cases. The central position assumed is, that the evidence does not show any promise. This is the question presented to us, and the question to which we at this point limit our decision. We are, therefore, required to determine whether there is evidence fairly supporting the verdict on this subject, and in doing so we must take that which the jury deemed credible and trustworthy. Julian v. Western Union Tel. Co., 98 Ind. 327.

We cannot sustain the verdict unless we find in the record evidence tending to prove that a promise to remedy the cause of the

augmented danger of the service was made by the appellant, and that this promise induced the appellee to remain in the service after he acquired knowledge of the increased peril caused by his employer's failure to furnish him with a lantern. Two things must concur: the promise, express or implied, and the inducement created by it. If either be absent the case fails. If no reliance was placed on the promise there could not have been an inducement influencing the appellee to continue in the service with knowledge of its increased danger, and if no promise was made the case is still stronger against the appellee, for in that event there could be no possible ground for the position that the employer induced him to continue in the service.

The appellee's argument on the point under discussion is, that the evidence shows "three conversations between the servant and his master's agent; the first two being friendly, and resulting in each case in a distinct promise to furnish the lantern. The third was due to the neglect of the master and the persistence of the servant, and was characterized by some angry words, but there was no withdrawal of the promises before made—nothing but an angry, petulant remark indicating at most that the fulfilment of the promise might be delayed. That the servant continued in the service with the expectation that the master would do his duty, and looked every night for the fulfilment of the promise. That he was sent by the agent of the master to do the particular service in which he was injured, and that he was doing his best to see the location of moving cars, and could have done so with a light, but, having none, was misled as to the track the moving cars were on, from having just seen a train being made up on track number three, and was thus injured by a sudden jar from a car on track number two, which he did not expect, and had no reason to anticipate, and against which he had taken no precaution."

In substance, the argument of the appellant is this: "Instead of a promise to furnish a lantern there was a quarrel, in which defendant's agent accused plaintiff of carrying off the lantern, and told him he would be lucky if he got another in a month. There was no promise at all. This was the last conversation upon the subject. There was no request that plaintiff should remain in the defendant's service till a lantern should be furnished. The plaintiff emphatically swears that defendant's agent did not lead him to believe he would get a lantern short of a month, and that he went to work without any expectation that Howells, the defendant's agent, would get him a lantern in less than a month, and in this same conversation he threatened to lamm the agent because 'it looked like he did not care for plaintiff's safety.' Now, if there had been a promise to furnish a lantern at the end of thirty days, that would not relieve plaintiff from the risk incurred by working without a lantern for that thirty days, when, as he says, he had no expectation

that a lantern would be furnished." See Stand. Oil Co. of Ind. v. Helmick, 148 Ind. 457.

It is true, as appellee's counsel affirm, that there were three conversations, and that in two of them a promise was made; but it is also true that the appellee, finding that the promise was not kept, entered complaint, and was told in the last conversation that he would be lucky if he got a lantern in a month. It is likewise true that the appellee did not, after the last conversation, rely on the promise previously made, for he testified that he did not expect to be supplied with a lantern. This is his own testimony: "After I had asked him for the lantern twice, and then left orders twice, I went over early to see him myself, and told him it was dangerous—it was a dangerous place to be without a lantern—and it seemed like it made him out of humor, and he said: 'You may think yourself well off if you get a lantern in a month,' and then I did not say anything more to him about it. That was two weeks before I was hurt that I asked Mr. Howells for the last time for a lantern. Well, when he would not get me a lantern, and when he spoke the way he did, I got a little excited, and when I get excited I will say what I please. He said the men need not be carrying their lanterns off, they were all charged up to them. I told him I had not lost my lantern, and had not carried it off, but put it into the box, and that if he would have a box for the night men and a box for the day men they might save their lamps. It was in this same conversation that he told me I would be lucky if I got another lantern in a month. It was after that I had a rough talk with him, because he had insulted me there, because it looked like he did not care for my safety." In answer to this question: "He did not lead you to expect that he was going to get a lantern for you short of a month in that conversation, did he?" the appellee said: "No, sir." He was also asked this question: "And you went on to work in the yard without a lantern, and without any expectation that Howells would get a lantern for you within a month, did you not?" and his answer was, "Yes, sir."

The appellee also testified that Howells was the only man he ever asked for a lantern, and thus narrates one of the first conversations: "I told him I had been pretty nearly killed down in the yard once without a lamp, and I did not want to be killed by neglect of having the lamp there; then I got a little out of fix because he didn't furnish me a lamp, and I told him I had pretty nearly got killed in that yard by being struck by a car, and all that; that is what I said, and then he promised to get me a lamp."

After the most careful study we find ourselves unable to resist the conclusion that the verdict cannot be sustained. We are constrained to hold that the appellee was not induced to remain in the appellant's service by any promise, express or implied. On the contrary, the clear and irresistible inference from the evidence is that

that a lantern would be furnished." See Stand[illegible] Ind. v. Hendrick, 148 Ind. 357.

It is true, as appellee's counsel affirm, that there were three conversations and that in one of them a promise was made; but it is also true that the appellee, finding that the promise was not kept, entered complaint and was told in the last conversation that he would be lucky if he got a lantern in a month. It is because true that the appellee did not mention the last conversation, nor the promise previously made, is satisfied that he did not expect to be supplied with a lantern. This is his own testimony: "When I had asked him for one several times and then left there twice, I went over early to [illegible] and told him it was dangerous—it was a dangerous [illegible] without a lantern, and it carried like it made him [illegible] and he said: 'You can think yourself well off if you get a lantern in a month,' and then I did not say anything more [illegible] That was two weeks after I was hurt that I asked him for the last time for a lantern. Well, when he [illegible] a lantern, and when I [illegible] the way he did, [illegible], and when I get excited I will say what I please, [illegible] need not be carrying [illegible] lanterns off, [illegible] up to them. I told him I [illegible] will lose my [illegible] carried it off, but put it into the [illegible] and that [illegible] for the night men and [illegible] for the day men, they [illegible] lamps. It was in the same conversation that he told me I would be lucky if I got another lantern in a month. [illegible] that I had a rough talk with him because he had required me [illegible] because it looked like he did not care for my safety." In answer to the question: "Did not counsel tell you to expect that he was going to get a lantern for you inside of a month in that conversation?" he said: "He told me, sir." He was also asked the question: "And you went on to work in the yard without a lantern and without any expectation that Howells would get a lantern for you within a month, did you not?" and his answer was, "Yes, sir."

The appellee also testified that Howells was the only man he ever asked for a lantern, and thus narrates one of the conversations: "I told him I had been pretty nearly killed down in the yard once without a lamp, and I did not want to be [illegible] scolded of having the lamp there; then I was a little out of [illegible] he didn't furnish me a lamp, and I told him I had [illegible] got killed in that yard by being struck by a car, and all [illegible] is—that I said, and then he promised to get me a lamp."

After the most careful study we are [illegible] unable to resist the conclusion that the verdict cannot be sustained. We are constrained to hold that the appellee was not employed to remain in the appellant's service for any definite [illegible] or implied. On the contrary, the clear and irresistible inference from the evidence is that

the promise was withdrawn, and that the appellee continued in the service, knowing its great danger, without any promise that the lantern, or lamp, required to make it safe, would be provided. He himself says that "he went on with the work without any expectation that Howells would get a lantern" for him within a month. This shows the construction put by the appellee upon the words of Howells, and it is the only natural and reasonable construction that those words will bear. With this, the appellee's own testimony, before us, we can see no other course consistent with duty open to us save that which leads to a reversal of the judgment. We must affirm that an employee, who continues in the employer's service after he has acquired knowledge of its great and immediate dangers, assumes the risk, unless he is induced to continue in the service by a promise, express or implied.

We do not depart from the rule that an employer is bound to use ordinary care to provide a safe working place and safe appliances for his employees; but we do hold that the rule cannot apply to such a case as this. The rule itself we regard as firmly settled. Indiana Car Co. v. Parker, *supra;* Krueger v. Louisville, etc., R. W. Co., 111 Ind. 51; Pennsylvania Co. v. Whitcomb, 111 Ind. 212.

It is the application of the rule as made by the appellee, and not the principle it asserts, that we deny. The rule asserts that the machinery and appliances must be kept safe as against those who do not know of their unsafe condition, but does not apply to those who know of their unsafe condition, and still continue in the service without being induced to do so by the employer's promise.

The employee has a right, until he acquires knowledge of danger, or by reasonable care might acquire such knowledge, to act upon the assumption that his employer will use ordinary care to provide safe appliances; but when he becomes fully informed of the danger, he can no longer act upon this assumption. Knowledge on his part puts an end to his right to assume that the master has done his duty. It is manifest that one who knows that a duty has not been performed cannot reasonably assert that he acted upon the assumption that it had been performed. The case, therefore, falls within the rule that the employee assumes the risks of all the dangers of which he has knowledge. Pennsylvania Co. v. Whitcomb, *supra;* Indiana, etc., R. W. Co. v. Dailey, 100 Ind. 75; Lake Shore, etc., R. W. Co. v. Stupak, 108 Ind. 1; Umback v. Lake Shore, etc., R. W. Co., 83 Ind. 191.

Where there is a promise to repair which induces the employee to continue in the service, then, doubtless, he may, for a reasonable length of time, rely on the promise and continue in the service, unless the danger of continuance, without a removal of the cause of it, is so great that a reasonably prudent man would not assume it. Hough v. Railway Co., 100 U. S. 213; Loonam v. Brockway, 3 Rob.

(N. Y.) 74; Illinois Cent. R. R. Co. v. Jewell, 46 Ill. 99; Crichton v. Keir, 1. C. Sess. Cas. (3d Series) 407.

Some of the cases go further and assert that the promise of the employer exonerates the employee entirely, even though the continuance in the service is known to him to be constantly and immediately dangerous. Ft. Wayne, etc., R. R. Co. v. Gildersleeve, 33 Mich. 133. We are not inclined to adopt this view. Our opinion is, that if the service cannot be continued without constant and immediate danger, and the danger and its character are fully known to the employee, he assumes the risk if he continues in the service. It is a fundamental principle in this branch of jurisprudence, that one who voluntarily incurs a known and immediate danger is guilty of contributory negligence, and we are unable to perceive why a promise should relieve the party injured through his own contributory fault. If the danger is not great and constant, then such a promise may well be deemed to relieve him; but where it is great and immediate, and is of such a nature that a prudent man would not voluntarily incur it, a promise does not nullify or excuse the contributory negligence. Even if there be a promise by the employer, the employee must not subject himself to a great and evident danger, since this he cannot do without participating in the employer's fault. The community have an interest in such questions, and that interest requires that all persons should use ordinary care to protect themselves from known and certain danger. A man who brings about his own death or serious bodily injury sins against the public weal. All must use ordinary care to avoid known and immediate danger, although it is not the assumption of every risk that violates this rule. When the line of danger, direct and certain, is reached, there the citizen must stop, and he cannot pass it, even upon the faith of another's promise, if to pass it requires a hazard that no prudent man would incur. Proceeding upon a somewhat different line of reasoning, other courts have reached the same conclusion as that to which we are led. Ford v. Fitchburg R. R. Co., 110 Mass. 240; Crichton v. Keir, *supra;* Couch v. Steel, 3 E. & B. 402. The general principle which rules here is strongly illustrated by the cases which hold that a passenger cannot recover for an injury received while acting in obedience to the directions of the conductor in whose charge he is, where obedience leads to a known danger which a prudent man would not voluntarily incur. Lake Shore, etc., R. W. Co. v. Pinchin, 112 Ind. 592; Cincinnati, etc., R. R. Co. v. Carper, 112 Ind. 26. If the rule prevails in such cases, much stronger is the reason why it should prevail in a case like this, where ordinary care is required of employer and employee alike, while, in the class of cases referred to, the highest degree of practicable care is required of the carrier and only ordinary care exacted of the passenger.

It is probably true that the promise of the employer, when relied

on by the employee, will rebut a presumption of contributory negligence in cases where the danger is not great and immediate, but this presumption yields whenever it appears that the employee voluntarily incurs a known and immediate danger of so grave a character that it would deter a reasonably prudent man from incurring it.

In the case before us the testimony convincingly shows that the appellee knew the danger he encountered, and it shows, also, that it was so great and immediate that a prudent man would not have assumed the risk it created. It results that even if it were conceded that there was a promise, and a reliance on it, there could be no recovery.

Reluctant as we are to set aside a verdict which has passed the scrutiny of a learned trial court, we cannot do otherwise in this instance.

Judgment reversed.

Filed December 27, 1887.

On petition for rehearing.

ELLIOTT, J.—In a very forcible and able brief, counsel for the appellee contend that we departed from the established rule and weighed the evidence. In this counsel are in error.

We took the evidence as we found it in the record, and decided, on the uncontradicted evidence, and there could be no recovery. The decision of the case, in the main, depends upon the question whether there was a promise, relied upon by the appellee, exonerating him from the consequences of his negligence in remaining in the appellant's service after he acquired full knowledge of its dangers. We have held in many cases that where the evidence fails to make out a case the judgment will be reversed. City of Warsaw v. Dunlap, 112 Ind. 576; Cincinnati, etc., R. W. Co. v. Long, 112 Ind. 166; Riley v. Boyer, 76 Ind. 152; Pittsburgh, etc., R. W. Co. v. Morton, 61 Ind. 539; Roe v. Cronkhite, 55 Ind. 183; Ray v. Dunn, 38 Ind. 230; Crossley v. O'Brien, 24 Ind. 325 (87 Am. Dec. 329).

Where, as here, there is only one witness upon a pivotal point, it is our duty to apply the law to his testimony, and if, under the law, the testimony is not sufficient to sustain a recovery, so adjudge. Where there is no conflict of testimony the court must necessarily decide the legal effect of the testimony in the record. In doing this there is no departure from the long-settled rule to which counsel refer.

The question of negligence is never one exclusively of fact. The jury find the facts, but if from the facts one inference only can be drawn, and that is that there was negligence, it must be so adjudged as matter of law; or, conversely, if it can be clearly affirmed as matter of law that there was no negligence, the court must so declare. In no case where negligence is the issue does the court entirely

abdicate its power, for as to the law it must always rule, although, in some instances, the jury ultimately decide whether there is, or is not, negligence; but in every case the court must declare the law.

In ruling that there is no negligence the court does not rule upon a question of fact. Judge Holmes says: "Where a judge rules that there is no evidence of negligence, he does something more than is embraced in an ordinary ruling that there is no evidence of a fact. He rules that the acts or omissions proved or in question do not constitute a ground of legal liability, and in this way the law is gradually enriching itself from daily life, as it should." Holmes Common Law, 120.

This principle applies here, for we rule, not that there is no evidence of a fact, but that the facts proved do not create a legal liability. It has been very often decided by our own and by other courts that, where the facts are undisputed and unequivocal, the court must apply the law to them. Wabash, etc., R. W. Co. v. Locke, 112 Ind. 404, and cases cited; Pittsburgh, etc., R. R. Co. v. Spencer, 98 Ind. 186, and cases cited; Counsell v. Hall, 5 New Eng. Rep. 462, n.

The doctrine that the welfare of society forbids a man from thrusting himself into immediate and certain danger without pressing necessity, remounts to the case of Hales v. Petit, 1 Plowden 253, a case made famous because of its having suggested, as many suppose, to Shakespeare, the grave-digger's scene in Hamlet. Although the reasoning of that case is quaint and fanciful, still the principle asserted is a wise one, and has long formed part of our jurisprudence.

We did not assert in our former opinion that an employee, who takes a risk that imperils his safety, cannot maintain an action; but we did decide that if he, knowingly and deliberately, assumes a risk that will lead him into immediate and certain danger, he cannot recover, although his employer had promised to remedy the defect. The authorities we cited sustain this principle, and we applied it to the uncontradicted evidence. Where, as here, there is only one witness to a material fact, we must act upon his testimony, and in applying a principle to it we do not weigh evidence. Cincinnati, etc., R. R. Co. v. Long, 112 Ind. 166; Palmer v. Chicago, etc., R. R. Co., 112 Ind. 250.

It may be that on another trial the evidence may be such as to take the case out of both the rules here stated, for it may well be that additional evidence will explain the testimony given by Mr. Watson, or prove circumstances giving it a different meaning and effect; but as the record presents the case to us, we find by applying the law to the evidence that the verdict is not supported.

Petition overruled.

MANUFACTURING COMPANY v. MORRISSEY.

1883. SUPREME COURT COMMISSION OF OHIO. 40 Ohio St. 148.

ERROR to the district court of Lucas county.

Patrick Morrissey, defendant in error, commenced an action in the court of common pleas of Lucas county against the Union Manufacturing Company, plaintiff in error, for damages alleged to have been sustained by him while in the service of the company, through the company's negligence in furnishing him hazardous and unsafe machinery to use, and placing over him an incompetent foreman.

The company was, in the year 1878, and had for some time before, been engaged in manufacturing wooden pails. Morrissey was injured by having a portion of his hand cut off while he was at work on a machine known as a "pail-lathe," which was composed in part of a circular saw, a jointer, and a bed or carriage commonly called a "bunk"—all used in the several operations necessary to make a pail, such as cutting off the staves to equal lengths, joining them, turning out the inside, turning off the outside, etc.

One Tivnan was the foreman of the room in which Morrissey was at work when injured, and as such had charge of all the men and machinery in the room. It was the foreman's duty to manage and control the men, and see that the machinery was kept in good order and condition.

On the morning of the injury, the foreman directed Morrissey, who had for sixteen months been at work under him on the lathe, to go to work on the part known as the jointer. He had worked on the jointer before this time for about six months. The jointer was in bad condition, and Morrissey called the foreman's attention to it, saying in reference to what is known as the bunk, "There ought to be something done with that." The foreman replied, "You joint a few staves—get out some staves to keep these fellows going—and I will take it upstairs and get it fixed." Morrissey thereupon commenced jointing, and shortly after, by reason of the defect in the bunk, his hand was forced against the saw teeth, and he was hurt as stated in his petition. About two weeks before he was injured, he had heard the foreman say to one of the workmen, named Fuller, who had called his attention to the bunk's need of repair, "I want you to keep on working until we get a lay-off and I will get it fixed."

In the court of common pleas, the testimony tending to show the negligence of the company, and all the facts in the case having been given to the jury, the court upon the motion of the defendant took the consideration of the case from the jury, and directed a verdict for the defendant—charging, that it was "a question entirely of law," and that Morrissey "had been guilty of gross negligence in using dangerous machinery when it was out of order, * * * al-

though," as the court further charged, "there was no dispute but that the defendant was guilty of gross negligence."

Morrissey by his counsel excepted; filed a motion for a new trial; and upon judgment for defendant being rendered, took bill of exceptions embodying in it all the testimony and charge of the court; and filed his petition in error in the district court, where the judgment of the court of common pleas was reversed, and the cause remanded for a new trial.

The case is here on petition to reverse the judgment of the district court.

DICKMAN, J.—There is no evidence that there was any carelessness on the part of Morrissey the defendant in error, in his mode of operating the machine through whose defects he was injured. On the morning of his injury—from the time of his commencing work, up to and at the time he was injured—he ran the machine much slower than usual, on account of its bad condition, and in order to avoid being hurt. The contributory negligence imputed to him, consisted in his knowing that the part called the "jointer" was out of repair, and could not be safely used, and in thereafter remaining in the service of the company and continuing to operate that portion of the machine. For that reason, the court below took the case from the jury, and directed a verdict for the company. The question of contributory negligence on the part of the plaintiff is generally a mixed question of law and fact; but, it is only when the facts are beyond dispute and admit of no rational inference but that of negligence, that the court has the right to apply the law without the aid of a jury. The defendant in error, while in the employment of the company, was under the supervision and direction of a foreman, whose duty it was to manage and control the workmen, and see that the machinery was kept in good order and repair. As soon as Morrissey discovered that the part of the machine upon which he was working was in a condition unsuitable for use, he complained of the same to the foreman, who promised him that the defects in the machine would be remedied, and ordered him to continue at his work. He thereupon began work at once at the jointer, and in a short time thereafter, was injured through its defects, before any steps were taken to remedy them. As a fact which was taken to be beyond dispute, the court charged the jury that the company was guilty of gross negligence. But, the court, in view of another fact beyond dispute, viz.: that Morrissey worked at the machine with knowledge of its defective condition, evidently considered it a settled principle, that such knowledge was, as matter of law, conclusive of contributory negligence on his part; and ignored the importance of other material questions of fact not beyond dispute, which might tend to qualify or limit the legal effect of such knowledge, and which should have been submitted by the court to the consideration of the jury. After the promise made to Morrissey himself by the foreman

that the jointer should be "fixed," and after hearing the foreman promise the same thing two weeks before to another workman, it became a material question of fact for the jury to determine, under proper instructions from the court, whether Morrissey after acquiring such knowledge, continued such a length of time in the service of the company, as to constitute a waiver on his part of the defects in the machine. Whether he afterwards remained in the employment of the company, because of his reliance on the promise of the foreman to put the jointer in repair; and whether the jointer was out of repair to such an extent, that a man of ordinary care would not continue to use it, even after a promise to put it in good repair—were also questions of fact, which should have been left to the determination of the jury, under proper instructions from the court. But it could not, in order to take the case from the jury, be said with reason, that knowledge alone of defects in the machinery and continuing to use the same, as matter of law, admitted of no rational inference but that of negligence, when such knowledge is taken in connection with the fact that Morrissey complained to the foreman of the defects, and received from him a promise that they should be remedied.

The court below applied the doctrine in all its latitude, without any qualification in the light of other facts and circumstances of the case, that if one knowingly and voluntarily exposes himself to danger by using dangerous machinery, he cannot be said to be without any fault or negligence on his part, and therefore cannot recover for injuries suffered by him in consequence. That a knowledge of the unsafe condition of the machinery used, is a most important element in determining the question of contributory negligence, there can be no doubt. Alone and unexplained, it may, under some circumstances, be conclusive that the injured party was willing to assume the attendant risks, and waive all objections to the defects that rendered the machinery hazardous. But, such knowledge, on the part of one induced to remain in the service of an employer by a promise to remove the cause of danger, is not of itself, in point of law, an answer sufficient to exonerate a defendant, who has omitted to supply machinery that is safe and proper. Relying upon such inducement held out by their employers, the most prudent workmen will often take risks, not merely on account of their own necessities, but in consideration of their employers whose interests require their continued service. Under such circumstances, the weight of authority is in accord with the language of Willes, J., in Holmes v. Worthington, 2 Foster & Finlason 533.

"If the defendants knew of the defect and undertook to repair it, and the plaintiff went on working, relying on their repairing it, then they may be liable. If the plaintiff complained of the defect, and the defendants promised that it should be remedied, he is not to be deprived of his remedy, merely because, relying on their promise, he remained in their employment."

To the same effect was the judgment in Clarke v. Holmes, 7 Hurlstone & Norman 937, in the exchequer chamber on appeal from the decision of the court of exchequer. In that case, the plaintiff was employed by the defendant to oil dangerous machinery. At the time the plaintiff entered upon the service, the machinery was fenced, but the fencing became broken by accident. The plaintiff complained of the dangerous state of the machinery, and the defendant promised him that the fencing should be restored. The plaintiff, without any negligence on his part, was severely injured in consequence of the machinery remaining unfenced. It was held, in the exchequer chamber—affirming the judgment of the court of exchequer—that the defendant was liable for the injury. Chief Justice Cockburn, in delivering his opinion, very forcibly draws a distinction between the case of an employee who knowingly enters into an engagement to work on defective machinery, and that of him, who in the course of his employment discovers its defective condition, but is induced to remain in the same service by the master promising him to remedy the defect. If the master in such a case fails to fulfill his obligation, the employee cannot be held to have waived his right to hold the master responsible.

The rule recognized in the English courts, has been followed by the supreme court of the United States in the instructive case, Hough v. Railroad Co., 100 U. S. 213. In that case, the engineer had a knowledge of the defect in the engine, and complained thereof to both the master mechanic and the foreman of the roundhouse. They promised that it should be promptly remedied. But, the court below seemed to attach no consequence to the engineer's complaint, or the promise made to him. Under the instructions given, if the engineer worked the engine with knowledge of its defect, the jury were to find for the company, although he may have been justified in relying upon the promise made to him that the defect should be remedied. The instruction in that branch of the case, involving the question of contributory negligence on the part of the engineer, was considered by the supreme court misleading and erroneous. Justice Harlan cites approvingly the language of Mr. Cooley, in his work on Torts. "If the servant having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant by continuing the employment engages to assume all risks."

In view of the whole current of authority, and in the light of reason, we are led to the conclusion, that under the circumstances of the case at bar, Morrissey's knowledge of the defective state of the machine which he was using and continued to use, was not, as matter

In the case cited was the judgment of Chief Justice [illegible], 7 Hurlstone & Norman 937, in the exchequer chamber, reversed from the decision of the court of exchequer. In that case the plaintiff was employed by the defendants to oil certain machinery. At the time the plaintiff entered upon the service, the machinery was moving, but the driving bands were to be shifted. The plaintiff complained of the dangerous state of the machinery, and the defendants promised that the [illegible] should be removed. The plaintiff, without any negligence on his part, was severely injured in consequence of the machinery remaining unaltered. It was held, in the exchequer chamber, reversing the judgment of the court of exchequer, that the defendants were liable for the injury. Chief Justice Cockburn, in delivering the opinion, very [illegible] a distinction between the case of an employé who [illegible] engagement to work on defective machinery, and that of him who, in the course of his employment, discovers the defective condition, and is induced to remain in the service by the master promising him to remedy the defect. The employé in such a case fails to fulfill his obligation if the employer continues not to have waived his right to hold the employé

The [illegible] to the English courts, has been followed by [illegible] of the United States in the [illegible] case, [illegible] 1 C. C. 213. In that case the engineer [illegible] defects in the engine, and complained thereof to [illegible] promised to [illegible] and the [illegible] of the machinery was [illegible] promptly remedied. But the court [illegible] denied as a consequence to the engineer a compliance on the promise [illegible] Under the instructions given, if the engineer viewed the [illegible] knowledge of its defect, the jury were to find for the [illegible] although he may have been justified in relying upon the [illegible] to have put the defect in repair. The instruction to that branch of the case involving the question of contributory negligence on the part of the engineer, was considered by the [illegible] most favorable [illegible] Justice Gray, after enumerating the [illegible] of the master in his work, in Texas: "If the servant, having a right to consider the service [illegible] is dangerous, objects [illegible] consequence of assurances that the danger shall be removed, he has to remain the master's [illegible] imperative, and the master is not in the exercise of ordinary care [illegible] has to [illegible] promises." Moreover, the [illegible] relies not [illegible] for the argument that the servant by continuing the employment engages to assume all risks.

In view of the whole current of authority, and in the light of reason, we are led to the conclusion that under the circumstances of the case at bar Morrissey's knowledge of the defective state of the machine which he was using and continued to use, was not, as matter

of law, conclusive of contributory negligence on his part. Such knowledge, however, was a prominent fact in the case, to be taken into consideration by the jury in connection with all the other facts and circumstances, in determining the question, whether his own negligence contributed to the accident by which he was injured.

The judgment of the district court must be affirmed.

Judgment accordingly.[1]

STEPHENSON v. DUNCAN.

1889. Supreme Court of Wisconsin. 73 Wis. 404.

Appeal from the circuit court for Taylor county.

Action to recover damages for personal injuries alleged to have resulted from the defendant's negligence in not providing a proper and safe covering for a saw in his shingle-mill, in which the plaintiff was employed, and in not providing a safe and proper passage-way by such saw, and in allowing the saw to project over its frame and partly over the passage-way along which the plaintiff was obliged to pass in the performance of his duties. Other allegations of the complaint will sufficiently appear from the opinion. The defendant appeals from an order overruling a general demurrer to the complaint.

Cole, C. J.—When the plaintiff entered upon his employment of operating the machinery and shingle-mill owned by the defendant, the unsafe condition of such shingle-mill, the fact that the saw was not covered, and that it projected over its frame partly across the narrow passage-way along which he was obliged to go in tightening and loosening the belt, were all matters presumably within his knowledge. The condition of the passage-way and the relation of the saw to it, if unsafe and dangerous, would be seen and comprehended by a person of common intelligence, and the plaintiff assumed the risk incident to the service when he undertook the employment. Under such circumstances, the plaintiff could not maintain the action for the injury he sustained because the defendant failed to provide safe machinery and did not cover the saw with a substantial cover-

[1] *Accord:* Roux v. Blodgett Lumber Co., 85 Mich. 519; Yerkes v. North Pac. Ry. Co., 112 Wis. 184.

"Some of the courts have drawn a distinction between a promise to repair at once, or within a reasonable time, and a promise to repair at a stated time in the future." Werner, J., in Rice v. Eureka Paper Co., 174 N. Y. 385, 393.

In Gunning System v. Lapointe, 212 Ill. 274, it was said that the master's promise to repair a defect does not suspend the servant's assumption of the risk where the servant is engaged in ordinary labor or the tools used are of simple construction, with which the servant is as familiar, and which he understands as fully, as the master.

ing nor provide a safe passage-way in place of the defective one; for, as we have said, he must be held to have assumed the risk by accepting and remaining in the service with knowledge of the existing defects in the machinery. The rule of law upon this subject has been laid down by this court in the following language: "It is well settled that the master may conduct his business in his own way, although another method might be less hazardous; and the servant takes the risk of the more hazardous method as well, if he knows the danger attending the business in the manner in which it is conducted. Hence, of a servant, knowing the hazards of his employment as the business is conducted, is injured while employed in such business, he cannot maintain an action against the master for such injury merely because he may be able to show that there was a safer mode in which the business might have been conducted, and that had it been conducted in that mode he would not have been injured." Naylor v. C. & N. W. R. Co., 53 Wis. 661; Hobbs v. Stauer, 62 Wis. 108. These decisions are all we deem it necessary to cite in reply to the argument that, as between master and servant, it is the duty of the former to provide suitable means and appliances to enable the servant to do his work as safely as the hazards incident to the employment will permit. This is undoubtedly the general rule, but it cannot apply here, for the reason that the plaintiff must be deemed to have entered upon the employment with full knowledge of the existing defects; therefore he assumed the risk. The fact that the saw was not covered, that the passage-way was narrow and dangerous, would be seen at a glance.

But probably the liability of the defendant was not intended to be rested upon the ground that the machinery used was not originally in a safe condition, for it is further alleged in the complaint that about ten days prior to the accident the plaintiff informed the defendant of the defective and dangerous condition of the shingle-mill, saw, and passage-way, and requested the defendant to repair the same, and to provide a suitable and safe passage-way, and to cover the saw, notifying the defendant, at the same time, that he would not remain and work the shingle-mill unless the same were put in a safe condition at once; that the defendant then promised and agreed to repair the mill, cover the saw, and put the passage-way in a safe condition, and by these promises induced the plaintiff to remain in his employment about the shingle-mill until he was hurt. If the complaint had stopped here, it might be held to state a cause of action, for it would then state a cause of action within the rule laid down and approved by courts of the highest authority, which hold that where the servant, having the right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances by the master that the danger shall be removed, such assurances remove all ground for holding that the servant by continuing in the employment engages to assume the risk. This doc-

trine is laid down in Hough v. Railway Co., 100 U. S. 213, in a very elaborate and learned opinion by Mr. Justice Harlan, where the law is fully discussed, and many authorities cited. The doctrine certainly rests upon rational grounds, and is amply supported by writers upon the law of negligence, as reference to the above opinion will show. It follows that it was the clear duty of the defendant to remove the danger or repair the defect in the passageway, and negligence will not be imputed to the plaintiff if he continued his employment for a reasonable time to allow the defendant to remove the defects.

The real question in each case is whether the master, under all the circumstances, had a right to believe and did believe that the servant waived his objection to the defect in the materials provided for the work, and assumed the risk, exempting the master from liability. "This is a question of fact, not of law; and it must be left to the jury, at least if not entirely free from doubt. There can be no doubt that, where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby within such a period of time after the promise as would be reasonably allowed for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept." 1 Shearm. & Redf. on Neg. (4th ed.), § 215. It appears that the plaintiff remained in his employment after the defendant promised to make the saw and passageway safe, and was then injured by slipping and falling upon the saw while going through the passage-way to tighten the belt. As a matter of law, we could not say this period was so long that it precluded all reasonable expectation that the defendant would make good his promise. The defendant would have a reasonable time to remove the defects, and the plaintiff should not be held to waive his objections to the machinery or assume any risk in respect to it while relying upon the defendant's promise to make it safe. But if the plaintiff did continue his employment for an unreasonable time after the defendant could have removed the defects, he would then be deemed to have waived his objections and assumed the risk of operating the machinery in the unsafe and dangerous condition in which it was. The difficulty with the complaint is that it is alleged that the plaintiff—obviously meaning the defendant—had ample time and opportunity, and was abundantly able, to repair and put in a safe condition the machinery and apparatus between the time the plaintiff informed him of its defects, and the time when the plaintiff was injured, but neglected and failed to do so, as was his duty, for the protection of the plaintiff. This allegation fairly implies that the plaintiff continued his employment beyond the period of time within which he might reasonably expect the defendant would keep his promise and put the machinery in proper condition. We must therefore hold the complaint defective, because it does not allege or show

that the plaintiff was injured within such a time after the defendant's promise as it would be reasonable to allow for its performance under the circumstances, for if the plaintiff continued in the employment longer than there were reasonable grounds for expecting the defendant would remove the defects, and was then injured, he would assume the risk of the dangerous condition of the machinery as when he entered upon the service.

We hold the complaint fatally defective because it does not appear that the plaintiff was injured while he had a reasonable expectation that the defendant would keep his promise. The demurrer to the complaint should have been sustained for this reason.

By the Court.—The order of the circuit court is reversed, and the cause remanded for further proceedings according to law.[1]

[1] "His continuance in the service for an unreasonable length of time after such promise is a waiver of the defects agreed to be remedied by his employer." Somerville, J., in Eureka Co. v. Bass, 81 Ala. 200, 214. To same effect see Dowd v. Erie R. R. Co., 70 N. J. L. 451.

The liability of a master for injuries to his servant has been changed by statute in some states. See the following Employers' Liability Acts: England: 43 and 44 Vict., Ch. 42; Indiana: Burns' Rev. St. 1901, §§ 7083-7087; Massachusetts: Rev. Laws 1902, Ch. 106, §§ 71-79; New York: Laws 1902, Ch. 600; United States: 1908, 35 Stat. L. 65. Ch. 149, § 1. See article, "Statutory Changes in Employers' Liability," by M. C. Hobbs, in 2 Harv. Law. Rev. 212.

See English Workmen's Compensation Act, 6 Edw. 7, Ch. 58. In 18 Green Bag 216-217 there are several articles discussing the Workmen's Compensation Acts of various European countries.

Section 1.—Agent's

CHAPTER XII.

DUTIES AND LIABILITIES OF AGENT TO PRINCIPAL.

Section 1.—Agent's Duty to Obey Instructions.

RECHTSCHERD v. ACCOMMODATION BANK OF ST. LOUIS.

1870. Supreme Court of Missouri. 47 Mo. 181.

Wagner, J.—Plaintiff brought his action on a certificate of deposit for $2,600, which defendant, by its answer, admits to be due.

Defendant, in its answer, sets up a counter-claim, and states that before the plaintiff's action accrued, the plaintiff, in consideration that defendant would receive him into its employ as collector and agent and pay him a salary of one thousand dollars per annum, promised and agreed with defendant that he would carefully and diligently attend to his duties as such collector and agent, and safely and prudently care for and deliver over and account for to defendant any moneys which he might receive into his custody as such agent and collector; and that defendant, relying upon such engagement and promise, did receive the plaintiff into its employ as collector and agent, and did pay him his said salary, and did in all things perform all the terms and conditions of said contract on its part to be performed, but that defendant, not regarding his said engagement and employment, failed and refused to account for and deliver a large sum of money, to wit: the sum of $2,983.06, the money of the defendant, which came into his care and custody while in the employment of defendant as such collector and agent, which sum of money, the property of the defendant, was, through the fault and neglect of the plaintiff, wholly lost to the defendant.

The plaintiff, in his replication, does not deny the terms and conditions of the contract and employment as set forth in the answer, but avers that he has in all things complied with the same. He denies that the sum alleged in the answer, or any other sum, was lost to the defendant through his fault or negligence, and alleges that the money was, without any neglect or fault on his part, taken from

him by thieves, robbers, and other persons, whilst he had the same in his possession and was taking extraordinary care of the same for and as the agent of the defendant, and therefore he was not liable for the same. The cause was tried at special term before a jury, who, after hearing the evidence and being instructed by the court, rendered a verdict for the plaintiff. Upon appeal to general term the judgment was reversed and the cause remanded for a new trial, and from this judgment the case is brought here by writ of error.

If the money was taken from the plaintiff by thieves or robbers when he was using ordinary care and guilty of no negligence, he was clearly not liable. But this was a question of fact for the jury to determine upon proper instructions. There was something said in the argument (and it is alluded to in the record) about inconsistent instructions being given to the plaintiff in the transaction of his business, by the cashier and the note clerk, two of the defendant's officers. Whether the note clerk had any authority to give the orders, or it was the duty of the plaintiff to obey, was not very clearly developed in the evidence, and should be rendered more apparent.

The first instruction given for the plaintiff is on the subject of contributory negligence, and, although not objectionable as a proposition of law, is hardly justified by the evidence. Of its own motion, the court instructed the jury that the plaintiff, as collector for the defendant, was bound to use such care as men of ordinary prudence would have used under like circumstances; if, therefore, the plaintiff used such care in doing the business of the defendant, he was not guilty of negligence, unless he disregarded reasonable instructions given to him by defendant or its authorized agents.

The following instruction asked by the defendant was refused: "Although the jury may believe from the evidence that the moneys in controversy in the counter-claim were taken from the plaintiff by thieves or robbers, yet the plaintiff is not excused from liability to the bank on that account, if the jury find that such loss by theft or robbery was occasioned by the failure of the plaintiff to obey the instructions given to him by the said Accommodation Bank or any of its officers thereto authorized."

It will be perceived that the view of the court was, that in order to render the plaintiff responsible for disregarding the instructions of the principal, those instructions must be reasonable; whilst the instruction asked by the defendant asserted the absolute right of the principal to give whatever instructions it saw proper, and the duty of the agent to obey. We suppose that there is no doubt about the established rule at law, that an agent is bound to execute the orders of his principal whenever, for a valuable consideration, he has undertaken to perform them, unless prevented by some unavoidable accident, without any default on his part, or unless the instructions require him to do an illegal or immoral act; and it is no defense that he

intended to act on the [illegible] contained. He is still responsible for loss occasioned by [illegible] or [illegible] a disregarding instruction [illegible] Co., 1 Story Agency, § 192; Hern v. [illegible] v. Wilson, 20 Pa. St. 394.)

It is the duty of the [illegible] faithfully to the orders of the principal, and if a loss occurs [illegible] he will not be held [illegible] may be disregarded in [illegible] emergencies, or of [illegible] require a breach [illegible] are, however, [illegible] in what has been said [illegible] instruction given [illegible] and that the instructions [illegible] given.

Judgment affirmed. [illegible]

JOHNSON [illegible] CENTRAL RAILROAD

1895. Court of Appeals, New York. 41 N. Y. 610.

Appeal from the supreme court. This action was for the value of ninety-one bales of hay, [illegible] Ludlow, Jr., at New York, and delivered to the plaintiff's [illegible] to be transported to Albany [illegible] by which [illegible] People's Line of steamboats [illegible] The hay was [illegible] by the defendant on the [illegible] and [illegible] to the property at Albany, [illegible] People's Line, which declined [illegible] were prohibited by act to [illegible] description. The hay was [illegible] "E. Corning," a [illegible] Albany and New York [illegible] on this description. The [illegible] 31st of December, and was [illegible] never that fall, that being the close of [illegible] On the passage to New York the hay was [illegible]

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(1) In the [illegible] of [illegible] fully to his instructions, [illegible] Hern v. [illegible] If he expends or [illegible] which are the natural [illegible] Merchants' Exp. Co., 60 Barb. 141.

intended to act for the benefit of his principal. He is still responsible for loss occasioned by any violation of his duties, either in exceeding or disregarding instructions. (Switzer v. Connet, 11 Mo. 88; Story Agency, § 192; Hays v. Stone, 7 Hill 128; Wilson v. Wilson, 26 Pa. St. 394.)

It is the duty of the agent to adhere faithfully to the orders of the principal, and if a loss occurs in consequence of his voluntary deviation, he will not be held faultless. It is true that instructions may be disregarded in cases of extreme necessity arising from unforseen emergencies, or if performance becomes impossible, or if they require a breach of law or morals. (Story Agency, § 194.) These are, however, exceptional cases. But the general rule is as indicated in what has been said above, and the case as made in the record is not brought within any of the exceptions. I think, therefore, that the instruction given by the court of its own motion was objectionable, and that the instructions asked by the defendant should have been given.

Judgment affirmed. The other judges concur.[1]

JOHNSON ET AL. v. NEW YORK CENTRAL RAILROAD COMPANY.

1865. COURT OF APPEALS OF NEW YORK. 33 N. Y. 610.

APPEAL from the supreme court. The action was for the value of ninety-one bales of tow, addressed to E. Ludlow, Jr., at New York, and delivered by the plaintiff's firm to the defendant at Little Falls, to be transported to Albany, and to be forwarded thence by the People's Line of steamboats to New York. The tow was received by the defendant on the 29th of November, 1854, and on the arrival of the property at Albany, it was offered to the proprietors of the People's Line, who declined to receive it, on the ground that they were prohibited by act of congress from transporting freight of that description. The tow was then shipped by the defendant on the "E. Corning," a freight barge in good condition, running in the Albany and New York line, which was accustomed to carry freight of this description. The barge left for New York on the 1st or 2d of December, and was the last boat in the line that went down the river that fall, that being the close of navigation for the season. On the passage to New York, the tow was lost with the barge.

[1] "It is the first duty of an agent, whose authority is limited, to adhere faithfully to his instructions, in all cases in which they can be properly applied. If he exceeds or violates or neglects them, he is responsible for all losses, which are the natural consequence of his act." Colt, J., in Whitney v. Merchants' Exp. Co., 104 Mass. 152, 154.

The cause was first tried before Judge Pratt, and the plaintiff recovered; but the judgment was reversed at the general term, which held that upon the foregoing facts that the defendant was not liable for the loss.

On the last trial, before Judge Hubbard, further evidence was given, tending to support the allegation made in the complaint, and denied in the answer, that the defendant was directed when the property was received to forward it only by the People's Line of steamboats.

On the first trial the plaintiff rested his case, in this respect, on the note made by the defendant at the foot of the entry in the way-bill books, "via People's Line;" but on the last trial it was proved that when the tow was taken to the defendant, the plaintiff asked Mr. Priest, the freight agent of the company, with whom the contract was made, whether the company could forward the tow in question by the People's Line, who replied that it could, but it would cost more than it would to send it by tow boats. The plaintiff told him that it was so late in the season, that unless the defendant could forward it by the People's Line, he did not then wish to send it, and that he did not care about the extra expense. Priest thereupon received the goods to be forwarded in that mode. This evidence was undisputed. It was also proved that there was daily communication by mail and telegraph between Albany and Little Falls.

The plaintiff claimed that under these circumstances, the forwarding of the flax by a tow boat, without notice to the owner, was a breach of duty, and that the defendant assumed the risk by disregarding the instructions. The judge held otherwise, and granted a nonsuit, which was sustained at the general term.

Porter, J.—The defendant undertook to transport the flax to Albany, and to forward it thence to New York by the People's Line of steamboats. On the refusal of that line to receive it, the defendant's obligation as a carrier ceased; and if it incurred any further liability, it was in the character of agent for the owner of the property. In the absence of instructions as to the mode of transportation from Albany, it owed no duty to the plaintiff, beyond the delivery of the property, in the usual course of business, to safe and responsible carriers for transmission to its destination: Brown v. Dennison, 2 Wend. 593; Van Santvoord v. St. John, 6 Hill 157. But when the forwarding agent is instructed as to the wishes of his principal, and elects to disregard them, he is guilty of a plain breach of duty. When he sends goods in a mode prohibited by the owner, he does it at his own risk, and incurs the liability of an insurer: Ackley v. Kellogg, 8 Cow. 225.

It appears in the present case that the contract was made with the freight agent of the defendant, who suggested that it would be better to forward the hemp by tow-boat from Albany; but the plaintiff replied, in substance, that it was so late in the season that he

would not send it, unless it could go by the People's Line. This proof tends to show that the defendant received the property with an express understanding that the hemp was not to be forwarded to New York unless by the People's Line. If this was so, the defendant was clearly liable. On the refusal of the steamboat proprietors to receive the property, the company should either have communicated the fact to the plaintiff, and awaited further instructions, or it should have relieved itself from liability, by depositing the hemp for safe-keeping in a suitable warehouse: Forsyth v. Walker, 9 Pa. St. 148; Goold v. Chapin, 20 N. Y. 259 (75 Am. Dec. 398); Fisk v. Newton, 1 Denio 451 (43 Am. Dec. 649).

There is a class of cases in which an agent is justified by an unexpected emergency in deviating from his instructions, where the safety of the property requires it. In this instances no such exigency arose. The only inconvenience which would have resulted to the owner from compliance by the carrier with his known wishes would have been mere delay in transmitting the hemp to market; and he had notified the company that he would rather submit to this delay than to hazard the tow-boat transportation, at the close of the season of navigation. The primary duty of the agent is to observe the instructions of his principal, and when he departs from these, he must be content with the voluntary risk he assumes: 1 Parsons on Contracts 69; Forrester v. Boardman, 1 Story 43; Ackley v. Kellogg, 8 Cow. 223.

The evidence would have authorized the jury to find that there was a breach of duty by the defendant, and the nonsuit was therefore erroneous. The judgment should be reversed, and a new trial should be ordered, with costs to abide the event.

Judgment reversed, and new trial awarded.

Brown and Campbell, JJ., dissented.

LAVERTY v. SNETHEN.

1877. Court of Appeals of New York. 68 N. Y. 522.

Appeal from judgment of the general term of the court of common pleas in and for the city and county of New York, affirming a judgment of the general term of the marine court of the city of New York, which affirmed a judgment in favor of defendant, entered upon a verdict.

This action was for the alleged conversion of a promissory note, the property of plaintiff, made by one Holly, payable to plaintiff's order.

The facts appear sufficiently in the opinion.

Church, Ch. J.,—The defendant received a promissory note from the plaintiff made by a third person and endorsed by the plaintiff, and gave a receipt therefor, stating that it was received for negotiation, and the note to be returned the next day or the avails thereof. The plaintiff testified in substance that he told the defendant not to let the note go out of his reach without receiving the money. The defendant, after negotiating with one Foote about buying the note, delivered the note to him under the promise that he would get it discounted, and return the money to defendant, and he took away the note for that purpose. Foote did procure the note to be discounted, but appropriated the avails to his own use.

The court charged that if the jury believed the evidence of the plaintiff in respect to instructing the defendant not to part with the possession of the note, the act of defendant in delivering the note, and allowing Foote to take it away, was a conversion in law, and the plaintiff was entitled to recover. The exception has been criticised as applying to two propositions, one of which was unobjectionable, and therefore not available.

Although not so precise as is desirable, I think that the exception was intended to apply to the proposition above stated, and was sufficient.

The question as to when an agent is liable in trover for conversion is sometimes difficult. The more usual liability of an agent to the principal is an action of assumpsit or what was formerly termed an action on the case for neglect or misconduct, but there are cases when trover is the proper remedy. Conversion is defined to be an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights. A constructive conversion takes place when a person does such acts in reference to the goods of another as amount in law to appropriation of the property to himself. Every unauthorized taking of personal property and all intermeddling with it, beyond the extent of the authority conferred, in case a limited authority has been given, with intent so to apply and dispose of it as to alter its condition or interfere with the owner's dominion, is a conversion. Bouv. Law Dict., title Conversion.

Savage, Ch. J., in Spencer v. Blackman, 9 Wend. 167, defines it concisely as follows: "A conversion seems to consist in any tortious act by which the defendant deprives the plaintiff of his goods."

In this case the plaintiff placed the note in the hands of the defendant for a special purpose not only, but with restricted authority (as we must assume from the verdict of the jury), not to part with the possession of the note without receiving the money. The delivery to Foote was unauthorized and wrongful, because contrary to the express directions of the owner. The plaintiff was entitled to the absolute dominion over this property as owner. He had the right to part with so much of that dominion as he pleased. He did

part with so much of it as would justify the defendant in delivering it for the money in hand, but not otherwise. The act of permitting the note to go out of his possession and beyond his reach was an act which he had no legal right to do. It was an unlawful interference with the plaintiff's property which resulted in loss, and that interference and disposition constituted, within the general principles referred to, a conversion, and the authorities I think sustain this conclusion, by a decided weight of adjudication. A leading case is Syeds v. Hay, 4 T. R. 260, where it was held that trover would lie against the master of a vessel who had landed goods of the plaintiff contrary to the plaintiff's orders, though the plaintiff might have had them by sending for them and paying the wharfage. Butler, J., said: "If one man who is intrusted with the goods of another put them into the hands of a third person, contrary to orders, it is a conversion." This case has been repeatedly cited by the courts of this state as good law, and has never to my knowledge been disproved, although it has been distinguished from another class of cases upon which the defendant relies, and which will be hereafter noticed. In Spencer v. Blackman, 9 Wend. 167, a watch was delivered to the defendant to have its value appraised by a watchmaker. He put it into the possession of the watchmaker, when it was levied upon by virtue of an execution note against the owner, and it was held to be a conversion. Savage, C. H., said: "The watch was intrusted to him for a special purpose, to ascertain its value. He had no orders or leave to deliver it to Johnson, the watchmaker, nor any other person." So, when one hires a horse to go an agreed distance, and goes beyond that distance, he is liable in trover for a conversion. Wheelock v. Wheelwright, 5 Mass. 103. So, when a factor in Buffalo was directed to sell wheat at a specified price on a particular day, or ship it to New York, and did not sell or ship it that day, but sold it the next day at the price named, held that in legal effect it was a conversion. Scott v. Rogers, 31 N. Y. 676; see, also, Addison on Torts 310, and cases there cited. The cases most strongly relied upon by the learned counsel for the appellant are Dufresne v. Hutchinson, 3 Taunt. 117, and Sarjeant v. Blunt, 16 Johns. 73, holding that a broker or agent is not liable, in trover, for selling property at a price below instructions. The distinction in the two classes of cases, I apprehend, is that in the latter the broker or agent did nothing with the property but what he was authorized to do. He had a right to sell and deliver the property. He disobeyed instructions as to price only, and was liable for misconduct, but not for conversion of the property, a distinction which, in a practical sense, may seem technical, but it is founded probably upon the distinction between an unauthorized interference with the property itself, and the avails or terms of sale. At all events, the distinction is fully recognized and settled by authority. In the last case Spencer, J., distinguished it from Syeds v. Hay, *supra*. He said: "In the case

of Syeds v. Hay, 4 Term R. 260, the captain disobeyed his orders in delivering the goods. He had no right to touch them for the purpose of delivering them on that wharf."

The defendant had a right to sell the note, and if he had sold it at a less price than that stipulated, he would not have been liable in this action, but he had no right to deliver the note to Foote to take away, any more than he had to pay his own debt with it. Morally, there might be a difference, but in law both acts would be a conversion, each consisting in exercising an unauthorized dominion over the plaintiff's property. Palmer v. Jarmain, 2 M. & W. 282, is plainly distinguishable. There, the agent was authorized to get the note discounted, which he did and appropriated the avails. Parke, B., said: "The defendant did nothing with the bill which he was not authorized to do." So, in Cairnes v. Bleecker, 12 Johns. 300, where an agent was authorized to deliver goods on receiving sufficient security, and delivered the goods on inadequate security, it was held that trover would not lie, for the reason that the question of the sufficiency of the security was a matter of judgment. In McMorris v. Simpson, 21 Wend. 610, Bronson, J., lays down the general rule that the action of trover may be maintained when the agent has wrongfully converted the property of his principal to his own use, and the fact of conversion may be made out by showing either a demand and refusal, or that the agent has without necessity sold or otherwise disposed of the property contrary to his instructions. When an agent wrongfully refuses to surrender the goods of his principal, or wholly departs from his authority in disposing of them, he makes the property his own and may be treated as a *tort feasor.*" The result of the authorities is that if the agent parts with the property, in a way or for a purpose not authorized, he is liable for a conversion, but if he parts with it in accordance with his authority, although at less price, or if he misapplies the avails, or takes inadequate for sufficient security, he is not liable for a conversion of the property, but only in an action on the case for misconduct. It follows that there was no error in the charge. The question of good faith is not involved. A wrongful intent is not an essential element of the conversion. It is sufficient if the owner has been deprived of his property by the act of another assuming an authorized dominion and control over it. 31 N. Y. 490. It is also insisted that the parol evidence of instructions not to part with the note was incompetent to vary the terms of the contract contained in the receipt. This evidence was not only not objected to, but the point was not taken in any manner. The attention of the court was not called to it, and the court made no decision in respect to it. Under these circumstances it must be deemed to have been waived, and is not available upon appeal. But if an exception had been taken I am inclined to the opinion that the testimony was competent. It is not claimed that it varies that part of the receipt which contains an agreement to return

the note or the money the next day, but that it varies the clause stating that the note was received for negotiation. This expresses the purpose of receiving the note, and if deemed a contract, can it be said that a parol mandate not to part with possession of the note before sale and receipt of money is inconsistent with it?

There is no rule of law which gives an agent the right thus to part with a promissory note under the mere authority to negotiate. The instructions were consistent with the purpose expressed, although if they had not been given a wider field of inquiry might have been opened. A promissory note passes from hand to hand, and a *bona fide* holder is protected in his title, and it might well be claimed that an authority to sell would not ordinarily justify a delivery to a third person without a sale. Without definitely passing upon this question, we think that the question should have been in some form presented at the trial. In a moral sense the defendant may have acted in good faith, and hence the judgment may operate harshly upon him, but the fact found by the jury renders him liable in this action.

The judgment must be affirmed.

All concur.

Judgment affirmed.[1]

GREENLEAF v. MOODY AND OTHERS.

1866. SUPREME JUDICIAL COURT OF MASSACHUSETTS.
13 Allen 363.

FOSTER, J.—This case must depend for its decision upon the application of well established legal principles to a state of facts of an unusual and extraordinary character.

[1] *Accord:* Chase v. Baskerville, 93 Minn. 402. Compare Minneapolis Trust Co. v. Mather, 181 N. Y. 205.

It is no defense to an agent when sued for loss resulting from his failure to collect a claim according to instructions, that he used diligence in trying to collect the claim in another way. Butts v. Phelps, 79 Mo. 302.

"Whenever an agent violates his duties or obligations to his principal, whether it be by exceeding his authority, or by positive misconduct, or by mere negligence or omission in the proper functions of his agency, or in any other manner, and any loss or damage thereby falls on his principal, he is responsible therefor, and bound to make a full indemnity. And it will constitute no defense for him, that he intended the act to be a benefit to the principal. Indeed, in all such cases, the question is not whether the party has acted from good motives and without fraud; but whether he has done his duty, and acted according to the confidence reposed in him." McBride, J., in Switzer v. Connett, 11 Mo. 88, 89.

"If an agent, acting in good faith, disobey the instructions of his principal and promptly informs the principal of what he has done, it is the duty of the principal, at the earliest opportunity, to repudiate the act if he disapprove. Silence in such a case is a ratification." McCay, J., in Bray v. Gunn, 53 Ga. 144, 148.

The defendants, commission merchants or factors in New Orleans, received during the rebellion in 1864 from the plaintiff a large quantity of hay consigned for sale, upon which they made advances in payment of freight and other charges amounting to about half its value. Three hundred and twenty-one tons of hay were sold to the military officers of the United States for cash. The remainder, 134 tons were seized by military authority. No fault could be imputed to the factors for either of these events. The sales for cash were clearly within the scope of their authority, and the seizure by the strong arm of military power was an occurrence beyond their control.

The only payment which the United States officers would make, either for the hay purchased or for that seized, was in certificates of indebtedness, the negotiable notes of the United States, payable to the bearer and upon interest at the rate of six per cent. per annum. The factors accepted these as payment, and at once sold them for their market value, ninety-three cents on the dollar. The plaintiff claims that the defendants are liable for the loss sustained by this sale at a discount, first, because as factors they had no right to take in payment such securities; and secondly, because, if justified in accepting them, they had no right to sell them below par without notice to him. And we are called upon to decide whether in either of these particulars they violated their duty, so as to render themselves personally answerable to their principal, the consignor, for the loss sustained by the sale of the certificate at a discount below their face.

The ordinary rule is clear, that factors must obey the instructions of their principal; that they may not compromise debts without authority; that they must, under a change of circumstances, advise the consignor, and await his directions; and that they must conform to the usages of trade presumed to be known to both parties, or to the course pursued by them and approved by the owner in former instances. But what is their duty in novel, critical and unforeseen emergencies? To answer this question we may refer to an opinion of Mr. Justice Story in a suit relative to the conduct of a supercargo who had totally departed from the instructions of the shipper, which is so apposite that we adopt its principles and the substance of its language. In circumstances of necessity or great urgency it is only necessary that the agent should act *bona fide* and with reasonable discretion. "What, then, was it the duty of the supercargo to do in such a case of unexpected occurrence, not within the contemplation of the instructions?" "Now I take it to be clear that if, by some sudden emergency, or supervening necessity, or other unexpected event, it becomes impossible for the supercargo to comply with the exact terms of his instructions, or a literal compliance therewith would frustrate the objects of the owner and sacrifice his interests, it becomes the duty of the supercargo, under such circumstances, to do

the best he can, in the exercise of a sound discretion." "He becomes, in such a case, an agent from necessity for the owner." "In all voyages of this sort there is an implied authority to act for the interest and benefit of the owner in all cases of unforeseen necessity and emergency, created by operation and intendment of law." Forrester v. Boardman, 1 Story 43, 51. A justification founded upon necessary departure from the ordinary custom of trade or from actual instructions must undoubtedly be construed with considerable strictness. The agent cannot be allowed lightly or unadvisedly to assume a latitude of discretion not conferred upon him by express authority, or by those usages of trade, which both parties are presumed to have known and contemplated. But the interests of commerce require, and the enlightened principles of commercial law bestow, a discretion which enables the factor to protect his principal from the irreparable injury which would be liable to arise in the absence of authority to act under critical circumstances, unexpectedly occurring, which do not admit of delay for the purposes of communication and consultation. And the factor, so placed, who acts prudently and in good faith, as the owner himself, being a wise man, would have been likely to do if personally present, finds his protection in the sincerity and sound discretion of his conduct, and is not answerable for consequences, although subsequent events may demonstrate that his principal would have been the gainer by a different course from the one he has conscientiously and discreetly adopted.

This is the rule which must govern the decision of the case here submitted to us. It is a question of fact rather than of law. The good faith of the defendants is expressly conceded. We might, in strictness, give judgment for them on the ground that the case stated does not affirmatively establish their liability. But we prefer, in conformity with what we suppose to be the intention of the parties, to consider and pass upon the question, whether the defendants did act with such prudence and discretion as to exempt them from liability. Ought they to have refused the certificates proffered in payment? If they had done so, the only redress open the plaintiff would have been an application to the war department at Washington or to congress or to the court of claims. No rational man could regard these remedies as worth pursuing to avoid a discount of seven per cent., the whole amount of which was only $1,659.28. The expense, the delay, the uncertainty of ultimate success, would have induced any one, having regard solely to his pecuniary interest, and acting in his own affairs, to accept the proffered certificates rather than to attempt to stand upon his strict legal rights, where no legal remedy was practically available without disadvantages disproportionate to the amount at stake.

The propriety of selling the certificates may be considered more questionable. As they were sold as soon as received, justice requires

us to regard the factor's entire judgment and conduct together, and if the principal was benefited by the whole exercise of their discretion, and placed in a better condition than if they had refused to assume the responsibility, it would be unfair to subject them to loss because they might in one respect have done still better. No one can say that they would have decided to accept the certificates without also, as a part of the same mental act, deciding to convert them forthwith into cash. But we do not proceed upon this narrow ground alone. In guarding the interests of a distant principal it was their duty to err on the side of prudence rather than of overconfidence. We must remember the situation of the parties and the country at the time of the transaction, and judge by the light they then had, and not according to the wisdom that comes after the event. The ordinary facilities to correspondence between Maine and New Orleans was greatly interrupted. No telegraphic communication was possible. The mails were slow and uncertain, and somewhat exposed to capture in transit. The interval within which the most speedy interchange of letters could take place was long enough for momentous events. The pecuniary credit of the government depended on the varying fortunes of war. A single disaster might have depressed the market value of the securities far below the point at which they then stood. Other factors and agents similarly situated with themselves deemed it their duty to realize at the current rates of the market. More than half of the proceeds of the property would be required in New Orleans to pay advances and charges. The justification of the sale is not to be placed on the ground that they had a right to make a sacrifice in order to reimburse themselves, for factors cannot sell below limits without notice to the owner of the amount due and a request for payment. But the fact that the consignor owed $14,303.45, payable in New Orleans, on account of this shipment, was a circumstance of some weight in determining the question of expediency. If the securities were to be sent to the north, and the money due to be remitted thence, double risks of transportation must be incurred.

It is impossible for us to conclude that the course adopted exhibited any such error of judgment or neglect of duty as ought to render mercantile agents personally responsible to their principals.

Judgment for the defendant.[1]

[1] Compare Harter v. Blanchard, 64 Barb. (N. Y.) 617.

Regarding the right of a ship captain to sell the cargo see Butler v. Murray, 30 N. Y. 88.

MINNESOTA LINSEED OIL CO. v. MONTAGUE AND SMITH.

1884. SUPREME COURT OF IOWA. 65 Iowa 67.

PLAINTIFF brought this suit to recover a sum of money which it claims to have deposited with defendants, to be paid out only on tickets issued by one Valentine, an agent of the plaintiff, in the purchase of flaxseed, but which defendants, without authority, paid to said Valentine in payment of certain commissions. Defendants admit that the money was deposited with them, and that they paid it to Valentine for the purpose alleged by plaintiff, but deny that such payment was unauthorized, and allege that it was subsequently ratified by plaintiff. There was a verdict and judgment for the plaintiff, and defendants appeal. The cause has heretofore been in this court. See 59 Iowa 448.

REED, J.—1. * * * (The court here decided a question regarding the admissibility of evidence.)

2. The original arrangement under which the money was deposited with defendants was made with them by one Harkness, as agent for the plaintiff. There was a conflict in the evidence as to the directions given by Harkness at this time as to the manner in which the money should be disbursed. Harkness testified that he directed the defendants to pay out money only on tickets issued by Valentine, which should show actual purchases by him of flaxseed; while defendants both testified that the direction was that the money should be paid out generally in the business of purchasing flaxseed for plaintiff, in which Valentine was engaged, and that Harkness informed them at that time that Valentine was to be paid a commission of six cents per bushel on all the seed purchased by him. The evidence shows without conflict that Valentine was entitled, under his arrangement with plaintiff, to receive as commissions on the purchases made by him the amount of money paid him by defendants. The defendants asked the court to give the following instruction, which was refused: "If the language used by plaintiff's agent in employing defendants as plaintiff's disbursing agents, to pay off checks made by Valentine, and instructing them as to their duties as such disbursing agents, was fairly capable of two constructions or understandings, or was ambiguous in its meaning, the plaintiff is bound by the understanding which his language fairly and reasonably conveyed to defendants, provided defendants acted in good faith in carrying out such understanding thus fairly and reasonably conveyed to them by the language of plaintiff's agent." Defendants assign the refusal to give this instruction as error. The court on its own motion instructed the jury that, "if the language used by plaintiff's general agent in making the arrangement with defendants was ambiguous, or fairly admitted of more than one construction,

that meaning is to be given in which they were understood by defendants, provided plaintiff's said general agent had reason to believe they were so understood by defendants." Omitting the qualification expressed in the last clause, this instruction presents the rule which is embodied in the instruction asked. With the qualification, however, it presents a very different rule. Under the instruction as given, defendants would be liable if they adopted and acted on a construction of the instructions of which they were fairly capable, but which was different from which was actually intended by the agent, and he did not know that they had adopted such wrong construction. This, it seems to us, would be to make the innocent party suffer for the wrong or negligence of another. If the instructions were "ambiguous, or fairly admitted of more than one construction," this was the fault or negligence of the party who gave them, and that party ought in justice to bear the consequence of such negligence, rather than the one who was deceived and misled by it. We think, therefore, that the instruction should have been given without the qualification. Vianna v. Barclay, 3 Cow. 281.[1] * * *

Judgment reversed and cause remanded for a new trial.[2]

WELLS v. COLLINS.

1889. Supreme Court of Wisconsin. 74 Wis. 341.

Appeal from the Superior Court of Milwaukee County.

The following statement of the case was prepared by Mr. Justice Taylor as part of the opinion:

This action was brought to recover for the wrongful conversion of certain sums of money collected by the defendant for the plaintiff, and converted by defendant to his own use. The material facts as shown upon the trial are the following: In 1883 the defendant was the agent of the plaintiff, Daniel Wells, Jr., in collecting rents and other moneys for him. At the same time he was also the agent of William S. Wells, collecting rents and transacting other business for said William S. Wells. The plaintiff was the owner of a certain dwelling-house situated in the city of Milwaukee, and on or about the ——— day of ————, 1883, he directed said defendant to collect the rents which should thereafter become due to him from the tenants of said premises, and pay over the money so collected to his

[1] A portion of the opinion is omitted.

[2] *Accord:* Bessent v. Harris, 63 N. Car. 542, 646; Pickett v. Pearsons, 17 Vt. 470, 477.

In Coker v. Ropes, 125 Mass. 577, an instruction to the jury, that where orders to an agent are explicit and intelligible the agent is deprived of any discretion in the execution of these orders, was held correct.

brother William S. Wells. [illegible] to collect the rents and pay the same to William S. Wells and furnished a copy from the plaintiff to his brother, William S. Wells, [illegible] of this direction, and before the commencement of this action the defendant collected rents from the premises and [illegible] of $368.20. Of this sum the defendant paid [illegible] to said William S. Wells [illegible] commencement of this action the plaintiff demanded of the defendant the said money so collected by him and not paid to said William S. Wells, and the defendant refused to pay over the same or any part thereof.

On the trial there was [illegible] as to the amount of rents collected, or the amount [illegible] by the defendant to William S. Wells, and the plaintiff recovered [illegible] the $50 admitted to have been paid to William S. Wells and the commissions due the defendant for collecting the rents. The defendant appealed from the judgment.

TAYLOR, J. — [illegible] question [illegible] tention, that the [illegible] of the respondent to the [illegible] regard to the rents collected by him under the direction given by [illegible] of creditor and debtor was merely without transaction. Believing [illegible] we must, under the evidence and findings of the court, that the rents were collected by the defendant as the agent of the respondent, under direction to pay the same to William S. Wells when collected, there can be no question [illegible] but that the money when collected was the money of the respondent and any application of such money by his agent other than the one directed would be a conversion of the money so collected and received. There could be no doubt or question as to the matter if the defendant had collected the rents himself and handed the money to the appellant, with directions to pay it to William S. Wells, and the appellant had misapplied it and converted it to his own use. [illegible] he receives the money of the respondent as agent of the landlord [illegible] receive the money as the property of the landlord [illegible] the money of the agent [illegible] ment between the landlord and [illegible] such money shall be [illegible] the relation of creditor and [illegible] to the money so received. [illegible] Cotton v. Slaughter, [illegible] Justice Potter, after a full discussion of the [illegible] have been decided. But [illegible] principles well established [illegible] money collected by him for the [illegible] that it, in the absence of [illegible] and himself as a [illegible] it to his own use, he is liable [illegible]

that meaning is to be given which they were understood by defendant, provided plaintiff's said general agent had reason to believe they were so understood by defendant." Omitting the qualification expressed in the last clause, this instruction presents the rule which is embodied in the proposition stated. With the qualification, however, it presents a very different rule. Under the instruction as given, defendants would be liable if they adopted and acted on a construction of the instructions which they were fairly capable, but which was different from what was actually intended by the agent, and he did not know that they had adopted such a wrong construction. This, it seems to us, would make the innocent party suffer for the wrong or negligence of another. If the instructions were "ambiguous, or fairly admitted of more than one construction," this was the fault or negligence of the party who gave them, and that party ought in justice to bear the consequence of such negligence, rather than the one who was misled and misled by it. We think, therefore, that the instructions should have been given without the qualification. [illegible] (Ch. 28.) * * *

[illegible] reversed and remanded for a new trial.

[illegible] v. COLLINS.

[illegible] of Wisconsin. 74 Wis. 341.

Appeal from the [illegible] Court of Milwaukee County.

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This action was brought to recover for the wrongful conversion of certain sums of money collected by the defendant for the plaintiff, and converted by defendant to his own use. The material facts as shown upon the trial are as following: In 1883 the defendant was the agent of the plaintiff [illegible] Wells, Jr., in collecting rents and other moneys for him. At the same time he was also the agent of William S. Wells, collecting rents and transacting other business for said William S. Wells. The plaintiff was the owner of a certain dwelling-house situated in the city of Milwaukee, and on or about the ——— day of ———, 1883, he directed said defendant to collect the rents which should thereafter become due to him from the tenants of said premises and pay over the money so collected to his

[illegible]

brother, William S. Wells. This direction to collect the rents and pay the same to William S. Wells was intended as a gift from the plaintiff to his brother, William S. Wells. After the giving of this direction, and before the commencement of this action, the defendant collected rents from the tenants of said dwelling-house to the amount of $368.20. Of this sum the defendant paid $50, and no more, to said William S. Wells. Before the commencement of this action the plaintiff demanded of the said defendant the said money so collected by him and not paid to said William S. Wells, and the defendant refused to pay over the same or any part thereof.

On the trial there was no dispute as to the amount of the rents collected, or the amount actually paid over by the defendant to William S. Wells; and the plaintiff recovered amount of said rents, less the $50 admitted to have been paid to William S. Wells, and the commissions due the defendant for collecting the same. The defendant appealed from the judgment.

TAYLOR, J.—(After deciding another question:) The other contention, that the only relation of the respondent to the appellant in regard to the rents collected by him under the direction given is that of creditor and debtor, is equally without foundation. Holding, as we must, under the evidence and findings of the court, that the rents were collected by the defendant as the agent of the respondent, under direction to pay the same to William S. Wells when collected, there can be no reasonable doubt but that the money when collected was the money of the respondent, and any application of such money by his agent other than the one directed would be a conversion of the money so collected and received. There could be no doubt in relation to the matter if the respondent had collected the rents himself and handed the money to the appellant, with directions to pay it to William S. Wells, and the appellant had neglected to pay it over and converted it to his own use. When he receives the money of the tenant of the respondent as agent of the landlord, does he not in law receive the money as the money of the landlord? It certainly is not the money of the agent when received, unless there be some agreement between the landlord and agent, either express or implied, that such money shall be considered the money of the agent, and that only the relation of creditor and debtor shall exist between the parties as to the money so received. Such was the decision of this court in Cotton v. Sharpstein, 14 Wis. 226. In the opinion in that case, Justice Paine, after a full discussion of the question, says: "We have found no case where the exact question now under discussion has been decided. But we are satisfied that it is the clear result of principles well established that it is the duty of the agent to keep money collected by him for the principal, to whom it belongs, and that if, in the absence of any authority, express or implied, to treat it as his own, and himself as a mere debtor, he wrongfully converts it to his own use, he is liable to an action of trover and to all the

legal consequences of such an action." In in re ————, 30 Eng. Law & Eq. 390, Lord Campbell said: "Those bills were chattels, sent to him to be applied to a specific purpose for the benefit of the client, and he could not honestly mix the proceeds of those bills with his own proper money. * * * Unless there was some evidence of condonation on the part of the client, we cannot treat this as a case of mere debt." So in the case at bar, the rent money came to the hands of the appellant for a specific purpose, and he cannot divert the money from that purpose without the consent, express or implied, of the respondent. In this case the court has, upon sufficient evidence, found that no such consent was given.

The fact, if such be the fact, that the respondent had treated the appellant as his debtor for other rents collected by him, would not help the appellant as to the rents collected under the order to pay the money so collected to William S. Wells. Such direction took these rents out of the course of general dealing between the parties, and appropriated them to a particular purpose; and, according to the findings of the court, which are clearly supported by the evidence, the appellant did not appropriate them to such specific purpose, but, on the contrary, converted them to his own use, without the consent, either express or implied, of the respondent or of William S. Wells.

We think the case was properly decided by the superior court.

By the Court.—The judgment of the Superior Court of Milwaukee County is affirmed.

Section 2.—Agent's Duty to Observe Good Faith.

HEGENMYER and Another v. MARKS.

1887. Supreme Court of Minnesota. 37 Minn. 6.

Gilfillan, C. J.—The plaintiff owned a lot of land in Minneapolis. One Creigh was a real estate broker, and at his request she employed and authorized him to sell the lot to any one who would purchase it at such sum as would net her $1,050, Creigh to receive as his compensation whatever he could get for the lot in excess of $1,050. At the time of such employing he (believing it to be true) represented to her, and she believed, that $1,050 was the fair market value of the lot. Both of them supposed the lot to be entirely vacant; but a third person, owning the adjoining lot, had by mistake constructed on her lot, thinking it was his, a valuable house and barn in such manner that they were part of the realty. Neither plaintiff nor Creigh knew anything of this at the time of employing. With the buildings the lot was worth over $3,000. Creigh learned of it before making a sale, but did not disclose it to plaintiff. He sold the lot to defendant for $1,150, the latter knowing of the buildings on

legal consequences of such an action." In ——, 30 Eng. Law & Eq. 390, Lord Cranworth said: "If the bills were chattels, sent to him to be applied for a specific purpose by the consent of the owner, and he could not legally mix the proceeds of those bills with his own proper money [illegible] unless there was some evidence of consentation on the part of the client, we should treat this as a case of mere debt." But in the case at bar, the bill never came to the hands of the appellee for a specific purpose, and he cannot divert the money from that purpose without the express or implied, of the respondent. In this case the court has found sufficient evidence, based upon such consent was given.

The fact [illegible] that the respondent had treated the appellant as his debtor for the rents collected by him, would not help the appellant to the [illegible] collected under the order to pay the money to [illegible] William S. Wells. Such direction took these rents out of the [illegible] general dealing between the parties, and appropriated them to a particular purpose; and, according to the finding of [illegible] were clearly supported by the evidence, the appellee [illegible] was not to retain them to such specific purpose but to apply the [illegible] them to his own use, without the consent, [illegible] of the respondent or of William S. Wells.

[illegible] was properly decided by the superior court.

[illegible] the judgment of the Superior Court of Mi[illegible]

Section 2.—Agent's Duty to Observe Good Faith.

[illegible] and Another v. MARKS.

[illegible] Minnesota. 45 Minn. 15.

Gilfillan, C. J. The plaintiff owned a lot of land in Minneapolis. One Creigh was a real estate broker, and at his request employed and authorized him to sell the lot to any one who would purchase it at such price as would net her $12,000. Creigh to receive as his compensation whatever he could get for the lot in excess of $12,000. At the time of such employment the plaintiff is to be represented to her, and she believed, that $12,000 was the fair market value of the lot. Both of them supposed the lot to be entirely vacant; but a third person owning the adjoining lot, had by mistake constructed on her lot a building, it was his, a valuable house and so in such manner that they were part of the realty. Neither plaintiff nor Creigh knew anything of this at the time of employing [illegible] the buildings the lot was worth over $5,000. Creigh learned [illegible] before making a sale, but did not disclose it to plaintiff. He sold the lot to defendant for $12,150, the latter knowing of the buildings [illegible]

the lot and knowing that Creigh knew and that plaintiff was ignorant of the fact. Of the $1,150, $450 was paid in cash—plaintiff receiving $350 and Creigh $100—and $700 was secured by defendant's note to plaintiff and his mortgage on the lot. Upon learning of the facts plaintiff tendered to defendant the $350, with interest, and the note and mortgage, and demanded a reconveyance of the lot, which defendant refused. The action is to rescind the sale and conveyance. The court below decided in favor of plaintiff.

The decision of the court below proceeds on the propositions: First, that it was the duty of Creigh, upon learning of the buildings being upon the lot, to communicate that fact to plaintiff, and that by selling the lot without disclosing that fact, at a price which he knew she had put upon it in ignorance of that fact, he committed a fraud upon her; and, second, that defendant, by purchasing with notice of Creigh's fraud, became a party to it. If the first proposition be correct the second follows as a necessary consequence.

The case turns upon whether it was the duty of Creigh, before making a sale, to disclose what he had learned to his principal. Upon this contract of agency my brethren are of opinion (though it is not mine) that when Creigh learned a fact affecting the value of the property, and of which fact he knew she was ignorant when she fixed the price, and if he had reason to believe that, had she known the fact, she would have fixed a higher price (as in this case she undoubtedly would), then good faith toward his principal required of him, and it was his legal duty, to disclose the fact to her before he proceeded to sell, so that she might, if so disposed, fix the selling price in accordance with the actual condition of things. This being so, his selling upon the basis of the price fixed first, without disclosing to her the fact he had learned, was of course a fraud on her.

The tender was sufficient. Defendant and Creigh were parties to the fraud on plaintiff, by which Creigh, one of the parties, received (in effect) from defendant, the other party to it, $100. No consideration of equity or morality would require of plaintiff to make that good either to Creigh or defendant. All that can be required of her as a condition of her repudiating the transaction imposed on her by the fraud of Creigh and defendant is to restore what (in ignorance of the facts) she received in the transaction.

Judgment affirmed.

CONKEY v. BOND.

1867. COURT OF APPEALS OF NEW YORK. 36 N. Y. 427.

APPEAL from the Supreme Court. The action was brought to rescind a sale of stock in the Oswego Starch Company, made by the defendant to the plaintiff in February, 1857, and to recover $1,500,

the price paid therefor, and certain payments made by the plaintiff as a stockholder.

The complaint alleged the facts upon which the plaintiff claimed that the sale was fraudulent in fact and in law. These were, in substance, that the defendant undertook to purchase stock in that company as his agent, and that he fraudulently transferred his own stock to the plaintiff, at a price greatly exceeding its value, under the pretense that it was the stock of other parties which he had purchased for the plaintiff as his agent; that he concealed this fact from the plaintiff, and upon its discovery by the latter, shortly before the commencement of this suit, he refused to rescind the sale. The complaint further alleged that the defendant made false representations to the plaintiff as to the value of the stock and the financial condition of the company, to induce him to make the purchase.

The judge, before whom the cause was tried, found that no representations were made by the defendant which he knew to be false, and held, as matter of law, that the other facts established by the pleadings and proofs did not entitle the plaintiff to relief.

These were substantially as follows: In January, 1857, the defendant was the owner of a number of shares of the Oswego River Starch Company, and the agent of the company in the city of New York for disposing of its manufacture. In an interview at that date between the parties in New York, after a glowing account by the defendant of the business of the concern, and of which the plaintiff had previously no knowledge whatever, the plaintiff expressed a desire to purchase some one or two thousand dollars' worth of the stock, if any was to be obtained in the market, at a price not exceeding $150 per share. The defendant thereupon undertook to buy some, if it could be procured, and if successful he was to apprise the plaintiff, who resided in the county of Chenango.

Accordingly, on the 31st of January, 1857, he addressed a letter to the plaintiff, reiterating his opinion of the value of the investment, stating that he knew where he could obtain the stock at $150 per share, and asking defendant if he would like it. He stated further that he did not wish to advise the plaintiff, but if he should conclude to take the stock, he would "get and send him a certificate" for that amount. The plaintiff answered this letter on the 5th of February, remarking that he liked the statement, and was willing to take that amount, and desiring the defendant to obtain the certificate, when he would at once put him in the funds. This letter the defendant acknowledged on the 19th by a brief note, saying that he would write and get the certificate as soon as possible, and on the 25th of February he wrote again, inclosing the plaintiff the scrip for ten shares of the stock, and adding in a postscript: "If we meet with no mishap, I think our stock will pay well; I could sell quick at $150 if I had any to dispose of."

The plaintiff remitted the $1,500, and that closed the transaction.

The defendant did not, in fact, purchase any stock from the company or from any outside party, but caused ten shares of his own stock to be transferred to the plaintiff. He did not communicate this fact to the plaintiff at any time during the negotiation, or subsequently, and it was not discovered until the following June. At the time of the transfer the company was in an embarrassed condition, and the stock was of little intrinsic value, though these facts were unknown to the defendant, and he supposed the representations to be true which he made in this respect to the plaintiff. The affairs of the company were soon afterward wound up, and its effects passed into the hands of a receiver.

The complaint was dismissed; but the judgment was reversed and a new trial was ordered by the General Term in the fifth district.

The case, as decided in the Supreme Court, is reported in 34 Barbour 276.

PORTER, J.—The fact that the defendant volunteered his agency did not absolve him from the duty of fidelity, in the relation of trust and confidence which he sought and assumed. The plaintiff was induced to purchase at an extravagant premium stock of the value of which he was ignorant, on the mistaken representations of the defendant, who professed to have none which he was willing to sell. This assurance very naturally disarmed the vigilance of the respondent, and he availed himself of the defendant's offer by authorizing him to buy at the price he named. The defendant did not buy, but sent him a certificate for the amount required, concealing the fact that he had not acted under the authority, and that the stock transferred was his own.

There is no view of the facts in which the transaction can be upheld. He stood in a relation to his principal which disabled him from concluding a contract with himself, without the knowledge or assent of the party he assumed to represent. He undertook to act at once as seller and purchaser. He bought as agent, and sold as owner. The *ex parte* bargain, thus concluded, proved advantageous to him and very unfortunate for his principal. It was the right of the latter to rescind it, on discovery of the breach of confidence. It is not material to inquire whether the defendant had any actual fraudulent purpose. The making of a purchase from himself, without authority from the plaintiff, was a constructive fraud, in view of the fiduciary relation which existed between the parties. In such a case, the law delivers the agent from temptation by a *presumptio juris et de jure,* which good intentions are unavailing to repel. It is unnecessary to state our views more fully on this question, as it is fully and ably discussed in the opinion delivered by Judge Bacon in the court below, and his conclusions are abundantly fortified by authority. (34 Barb. 276; Gillett v. Peppercorne, 3 Beavan 78; Story on Agency, § 214; Michaud v. Girod, 4 How. (U. S.) 555; Davone v. Fanning, 2 Johns. Ch. 268, 270; Moore v. Moore, 1 Seld.

262; N. Y. Central Ins. Co. v. Protection Ins. Co., 14 N. Y. 91; Gardner v. Ogden, *22 id.* 347.)

The objection that this theory is inconsistent with that stated in the complaint is not sustained by the record. The essential facts are alleged, and the appropriate relief is demanded. The fact that the complaint alleged other matters which the plaintiff failed to establish impairs neither his right nor his remedy. *Utile per inutile non vitiatur.*

The order of the Supreme Court should be affirmed, with judgment absolute for the respondent.

All the judges concurring. Judgment accordingly.[1]

VON HURTER v. SPENGEMAN.

1864. Court of Chancery of New Jersey. 17 N. J. Eq. 185.

The Chancellor.—The bill alleges that in the year 1846 Edward F. Von Hurter became seized in fee of a lot in Jersey City, and after mortgaging the same for $825, in January, 1860, agreed to convey the premises to George W. Korn for $3,000. Having previously conveyed the legal title to one Michael Lienan, and having only an equitable title in the premises, Von Hurter, in order to carry his contract with Korn into effect, caused a bill to be filed for the foreclosure of the mortgage and the sale of the mortgaged premises. On the 2d of July, 1860, the premises were sold under a decree of this court, and struck off and conveyed to Spengeman, the defendant, for $2,005. Spengeman mortgaged the lot for $1,000, and on the 1st of September, 1860, he conveyed it to Korn, in fulfilment of the contract of Von Hurter, for $3,000. The mortgage of $1,000 constituted a part of the consideration, and the balance of $2,000 was paid by Korn to Spengeman. For this sum the bill prays that the defendant may be decreed to account, as trustee for the complainant.

The bill further charges that the complainant was the adopted daughter of Von Hurter, and had been nurtured, maintained and educated by him and his wife from her infancy until the year 1860. That in May, 1860, Von Hurter, having lost his wife and being about to return to Europe, leaving the complainant in this State, ap-

[1] An agent to sell cannot himself become the purchaser. Bain v. Brown, 56 N. Y. 285.

"An agent to purchase cannot be allowed, except as his principal assents, to purchase for himself. He can acquire nothing by an adverse purchase, even though he contribute of his own means or credit to effect it; the product will belong to the principal exclusively." Stewart, J., in Bergner v. Bergner, 219 Pa. St. 113, 119.

See also Geisinger v. Beyl, 80 Wis. 443.

402; N. Y. Central Ins. Co. v. Protection Ins. Co., 14 N. Y. 91; Gardner v. Ogden, 22 id. 327.)

The objection that the theory of recovery set forth in the complaint is not sustained by the record. The essential facts are alleged, and the appropriate relief is demanded. The fact that the complaint alleged other matters which the plaintiff failed to establish cannot neither his right nor his remedy. [illegible] and estoppel.

The order of the Supreme Court should be affirmed, with judgment absolute for the respondent.

All the judges concurring. Judgment accordingly.

VOS HEUVEL v. SPENGEMAN.

1894. Court for Correction of Errors. 17 N. J. Eq. 185.

The Complainant's bill alleges that in the year 1856 Edward F. Vos [illegible] was seized in fee of a lot in Jersey City, and [illegible] on the 28th day of January, 1856, agreed to convey the same to William W. Korn for $3,000. Having previously conveyed the said title to one Wilfred Lisman, and having no estate in the premises, Van Hurter, in order to carry the contract with Korn into effect, caused a bill to be filed for the foreclosure of the mortgage and the sale of the mortgaged premises. On the 1st of June, the premises were sold under a decree in the cause, and conveyed to Spengeman, the defendant, for $2,005. Spengeman mortgaged the lot for $1,000, and on the 1st of September, 1856, he conveyed it to Korn, in fulfilment of the contract of Van Hurter for $3,005. The mortgage of $1,000 constituted a part of the consideration, but the balance of $2,000 was paid by Korn to Spengeman. For this sum the bill prays that the defendant may be decreed to account, as trustee for the complainant.

The bill further alleges that the complainant was the adopted daughter of Van Hurter, and had been nurtured, maintained and educated by him and his wife from her infancy until the year 1850. That in May, 1850, Van Hurter, having left his wife and being about to return to Europe, leaving the complainant in this State, ap-

An appeal to set aside a sheriff's sale on the ground of fraud in the proceedings is not barred by the lapse of time. Bird v. Bonnet, 9 N. J. Eq. 468.

An appeal to purchase money is allowed against the principal creditor, a purchaser for himself. He is not required, in order to enforce the appeal, to show that the creditor, if he were present in court, would, the property not belong to the principal debtor. Stevens v. Hoagland, 29 N. J. Eq. 254, 256.

See also Hannigan v. Ivell, 36 Wis. 491.

pointed Spengeman her guardian, and constituted him the trustee of the fund in question for her benefit.

The material allegations of the bill are either admitted by the answer or satisfactorily established by the evidence. It appears from the answer and evidence in the cause that Von Hurter not only appointed Spengeman the guardian of the complainant during her minority, but that he also constituted him his attorney, with power to collect all debts and demands due and owing or of right belonging to him in America, and after satisfying certain specified claims and defraying necessary charges and expenses, to appropriate the residue to educate, support and maintain the complainant during her minority. The defendant admits that by virtue of this power, aside from the fund in question, he has received over $800, and claims to have expended in pursuance of the trust vested in him over $2,400, for which he exhibits his account.

The simple inquiry now is whether the defendant is bound to account to the complainant for the fund in question. Whether he has been guilty of a breach of trust by a misappropriation of the funds in his hand, and whether the account rendered by him is true and fair, may become subjects of inquiry hereafter. The defendant, by his answer, does not deny his liability to account for a part of the funds placed in his hands by Von Hurter. He exhibits an account, by which he claims to have expended, in execution of the trust for the benefit of the complainant, not only the amount of funds in his hands, for which he admits his liability, but also a large portion of the fund in controversy.

But the defendant objects, first, that at the time of the sale to Korn the title to the lot in question was not in Von Hurter, but that the premises had previously been conveyed to Michael Lienan to secure a debt due to him, and to defeat the claims of Von Hurter's creditors. There is no evidence of fraud practiced or meditated in the conveyance to Lienan. If there was, the objection does not lie in the mouth of this defendant. The land was sold to Korn as the property of Von Hurter. The sale was effected by the defendant. The title was perfected in Korn, and the purchase money was paid to the defendant as the agent of Von Hurter, in fulfilment of that contract. The defendant is estopped from questioning Von Hurter's title to the premises, or to the proceeds of the sale.[1]

The defendant further objects that this property was not purchased by him at the sheriff's sale, as trustee of the complainant, or for her benefit, but that it was purchased in his own name, with his own money, and for his own benefit. It is shown by the evidence that he prevented competition at the sale by stating that he wanted to save the property for Von Hurter or his family, or, in the language of another witness, that "he was going to bid it in for the

[1] *Accord:* Collins v. Tillou, 26 Conn. 368. Compare Burton v. Wilkinson, 18 Vt. 186.

benefit of Emma," the complainant. But aside from this testimony, the defendant was not in a position to purchase the property for his own benefit. He was the recognized agent of Von Hurter in the transaction, and the trustee of the fund for the complainant. He negotiated the contract of sale to Korn, and after the title had been perfected by a sale to him, under the decree of this court, he conveyed the premises in pursuance of the contract. A purchase by an agent or trustee in his own name, while in the performance of his office, enures to the benefit of his principal, or *cestui que trust.* 2 Story's Eq. Jur., §§ 1211, 1211a.

Again, it is urged that the fund in question was not the property of the complainant, and constituted no part of the fund entrusted to the defendant for her benefit. The objection is founded upon the terms of the deed from Von Hurter, appointing Spengeman guardian of the complainant, and conferring on him the title to the exclusive charge of the person and estate of the complainant. Neither at that time, nor afterwards, had Emma Von Hurter, the complainant, any estate in the land, and it is argued, therefore, that under the terms of the deed she acquired none, either in the land itself, or in the proceeds of the sale.

It is not perceived that the terms of the deed, so far as they relate to the appointment of the defendant as guardian, can in any wise affect the rights of the parties. The complainant was not the daughter, but an adopted child of Von Hurter; and for the purpose of this suit, the appointment of the guardian may be treated as inoperative and void. But by the same instrument, the defendant is constituted the attorney of Von Hurter, with power to collect all debts and demands of whatever nature and kind, either in law or equity, which were or might be due and owing, or of right belonging to Von Hurter, in America. At the date of the deed there was a subsisting contract for the sale of the land from Von Hurter to Korn, and an engagement on the part of the vendee to pay the purchase money to Von Hurter. This constitutes the fund in question. By the terms of the deed the residue of the moneys to be collected by the defendant, after defraying certain claims, and paying charges and expenses, were to be appropriated by him to the education, support and maintenance of the complainant till she attain the age of twenty-one years. This constituted the estate of the complainant, of which the defendant, as her guardian, was to have the custody.

It was suggested at the hearing that Lienan was a necessary party to the suit, on the ground that the decree of foreclosure was against him, as the owner of the equity of redemption, and that the surplus money arising from the sale was, by the order of this court, directed to be paid to Spengeman, he having been authorized by Lienan to receive the same. The objection has been obviated by making Lienan a party defendant. By his answer he admits the equity of the bill, and assents to a decree in favor of the complainant.

[illegible] Conrad the complainant. [illegible] the testimony the defendant was not in a position to purchase the property for his own benefit. He was the recognized agent of Van Hunter in the transaction, and the trustee of the fund for the complainant. He negotiated the contract of sale to Korn, and also [illegible] had been purchased by a sale to him, under the decree of the court, he conveyed the premises in pursuance of the contract. He [illegible] as an agent or trustee to his own use, while in the performance of his duties, prior to the benefit of his principal. 2 Story's Eq. Jur. §§ 1211, 1212 a.

Again it is urged that the fund in question was not the property of the complainant, but constituted no part of the fund conveyed to the defendant for her benefit. The objection is founded upon the terms of the deed from Van Hunter, appointing Springsteen guardian of the complainant, but conferring on him the title to the exclusive charge of the person and estate of the complainant. Neither at that time, nor afterwards, had Emma Van Hunter, the complainant, any estate in the [illegible], it is argued, therefore, that under the terms of the deed she acquired none either in the land itself, or in the proceeds [illegible].

[illegible] terms of the deed, so far as they relate to the [illegible] defendant as guardian, can in no wise [illegible] The compliment was to the daughter [illegible] of Van Hunter, and for the purpose of the [illegible], the appointment of the guardian may be treated as inoperative and void. But by the same instrument, the defendant is constituted the attorney of Van Hunter, with power to collect all debts and demands of whatever nature and kind, either in law or equity, which were or might be owing, or of right belonging to Van Hunter, in America. At the date of the deed there was a subsisting contract for the sale of the land from Van Hunter to Korn, and an arrangement [illegible] to pay the purchase money to Van Hunter. [illegible] fund in question. By the terms of the deed the proceeds of the moneys to be collected by the defendant, after deducting [illegible] fund, and paying charges and expenses, were to be appropriated to [illegible] the education, support and maintenance of the complainant till she attain the age of twenty-one years. The [illegible] age of the complainant, at which the defendant, as her guardian, was to have the [illegible].

It was suggested at the hearing that Liscom was a necessary party to the bill, as the [illegible] that the decree of foreclosure was against him, as the owner of the equity of redemption, and that the surplus money arising from the sale was, by the rules of the court, directed to be paid to Springsteen, as having been substituted by Liscom to receive the same. This objection has been obviated by making Liscom a party defendant. By his answer he admits the equity of the bill, and assents to a decree in favor of the complainant.

The complainant has not been furnished with the funds necessary for her maintenance and education. She is entitled to the relief prayed for. There must be a decree accordingly, and a reference to a master to take and state the account.

NORRIS AND FOLTZ v. TAYLOE.

1868. SUPREME COURT OF ILLINOIS. 49 Ill. 17.

THIS was a bill in chancery, filed in the court below by the appellee, against the appellants, to set aside two deeds, one made and executed by the appellee to the appellant, Norris, for certain lands situated in Jo Daviess county, and the other made and executed by the appellant, Norris, to his co-appellant, Foltz, for an undivided half of the same lands, and also for an accounting as to the mineral rents and mineral taken from the lands, both before and after the conveyance to Norris. The bill alleges that appellant, Norris, was the agent of appellee in the management of these lands, and that in his negotiation for the purchase of the same, he did not make such disclosures in reference to the value thereof, as it was his duty to have done, he occupying a fiduciary relation to appellee, and thereby procured the same at a greatly inadequate price. The court below rendered a decree in favor of the complainant, and the defendant appealed to this court. The further facts in this case are stated in the opinion.

BREESE, C. J.—Unless it is established that Varnell, in this transaction, was the agent of appellant, Norris, this decree cannot stand, and to that we have principally directed our attention.

What was the position of these parties? Tayloe, the owner of the land purchased for him by Varnell was a non-resident, had never seen the land, and knew nothing about it, save through Varnell's statements. Varnell became, thereafter, Tayloe's agent, and in answer to the question, "What was the scope of your agency?" he answered that the list of lands was placed in his hands by Tayloe himself, for the purpose of seeing that the taxes were paid from year to year; that he also had a general supervision, to see that the lands were not trespassed upon, and for this purpose he was empowered by Tayloe to employ other parties in other counties.

On a visit to these lands in the latter part of the spring of 1863, with appellant, Norris, he adjusted some difficulties that had arisen between the miners on the land, and made arrangements with Norris to pay the taxes and look after the land. At this time there were several parties digging and prospecting on the land when he was there. Norris himself was then there, digging for lead ore. Var-

nell left the lands in charge of Norris, authorizing him to take general supervision of them, and collect the rents as they might accrue. He gave no special power to Norris to grant leases, but told the parties, in the presence of Norris, upon the ground, that he, Norris, would have charge and control of the land.

Varnell spent two or three days while on this visit at the residence of Norris, at Galena, and in the mines, during which Norris proposed to purchase the lands for one thousand dollars, and in addition to that he proposed to purchase jointly with Varnell, which Varnell declined on the ground he had no money, upon which Norris proposed to advance the money, charging Varnell interest upon it until he could repay it. Varnell proposed then to investigate the matter, and after seeing Tayloe, at Washington City, the matter was then dropped. He afterwards received a letter from Norris, relating to the same subject.

What followed these preliminaries is found in the letters in the record. The first is the letter from Varnell to Norris, dated Mt. Vernon, February 12, 1866, in which Varnell asks Norris if he will attend to the taxes of 1865 on this land, and asks him how he progresses with the lead mines, asks him what he will give for the land, and then says: "I think I can buy it at a reasonable rate for you, or any one that may want. Please let me hear from you as soon as possible."

Here was a plain proposition to Norris, by Varnell, to become Norris's agent to buy this land. Was this offer accepted by Norris? On the 15th of February, Varnell writes to Norris for an offer for the whole tract, having before enclosed him Foltz's letter proposing to purchase the "forty." He says Norris shall have the refusal, and wants him to be liberal, and offer at once every dollar he feels like giving for the whole tract, and trusts he can make a big strike and get thousands of dollars' worth from it, and then asks, merely for his personal gratification, how much mineral has been taken from the land since the first digging commenced.

On the 14th of March, Norris answered this letter, and proposed to give two thousand dollars for the land and the accrued rents, which then amounted to more than eight hundred dollars, but which he represented at four or six hundred dollars, though no doubt innocently.

To this, on the 23d of March, Varnell responded by letter from Washington City, that the proposition is accepted. He asks Norris to send him the names of the parties, and the exact description of the land, and when he returns to this State, on the 10th of April, he will bring the deed with him, all right, duly executed, ready for delivery, and tells Norris he can go on as there will be no difficulty.

On the 3d of April, 1866, Varnell again writes Norris from Washington City, acknowledging receipt of a letter of March 27, from Norris, containing a description of the lands, and says he will

send on the deed as directed in a few days—that Mrs. Tayloe was sick, but would be all right in a day or so. He further says he has put the consideration at $1,500, being the amount at which Norris valued the land, and says he had authority to sell at $1,500, but "the amount I make I desire no one to know." He says he will be in Virginia until Saturday, when he will start the deed, which will be ready by that time; is glad Norris gets the land, and truly hopes he may do well with it. In a *nota bene* to this letter, he says: "I said nothing to Mr. T. (Tayloe) especially of the late strike. Don't think he would have sold if I did, but I really don't deem it of any great importance. We have spent a good deal on the land, and ought to make something out of it. Though he authorised me to sell at $1,500, if he knew I obtained $2,000 he might not feel kindly about it. I have had considerable trouble and loss of time with, and ought to make something out of it, and do not deem the transaction otherwise than as perfectly fair. I would be willing to give the price for the land myself, but I know he would not sell to me."

There is nothing appearing in the record to show that Varnell was the agent of Tayloe to bargain away this land, except Varnell's statement in the above letter, nor did he, as this correspondence shows, act as such, but as the agent of Norris to purchase the land for him, he, Varnell, having volunteered to be such agent, as is shown by his letter of February 12, 1866. He was not Tayloe's agent to sell, but had a supervisory control over the lands, as stated by him in his deposition. The same position was occupied by Norris. He had full charge of the land, and granted privileges in it, and to that extent was the agent of Tayloe. Norris well knew Varnell was not the agent to sell the land, but he made him his agent to purchase.

What, then, was Varnell's duty under the circumstances? Standing in a quasi confidential relation to Tayloe, and at the same time an agent of Norris to purchase valuable property which Tayloe had entrusted to him, it seems one of the plainest dictates of justice and honesty that Varnell, when negotiating with Tayloe to purchase the property, should have communicated to him all the knowledge he possessed, by the letters of Norris, of the supposed mineral wealth of the land, all of which he studiously withheld, believing, as he says, "it was a matter of no great importance."

At the time the letter of March 14, by Norris to Varnell, was written, proposing to give $2,000 for the land, the survey, which determined most important interests, had not been made, but it was made by the county surveyor about the middle of March, or a few days after the letter of the 14th. That survey developed the fact that a rich lode, not before certainly known to be on that land, was in fact on it, greatly enhancing its value, and even when the letter was written, sufficient developments had been made to justify the belief that the tract contained rich diggings, as in the months of

January up to the 23d of March, about 90,000 pounds of mineral, and up to April 1st, about 140,000 pounds were raised on it, so that it is very evident, the realities and the prospect together made the land immensely more valuable than the price offered and received, and these facts were known only to one of the contracting parties, Norris, and he acting and standing in a fiduciary relation to the owner, of whom, through Varnell, he purchased at a greatly inadequate price, which, on Varnell's own admission, Tayloe would not have accepted had he known the true state of the facts.

We cannot but think it was Norris's duty, before he permitted his offer of March 14 to go before Mr. Tayloe, to have communicated, fully, the result of the survey which was then in the process of execution, and which he could have done in his letter of March 27. By accepting the position of an agent to take charge of this land, collect the rents and royalty, and pay the taxes, a fiduciary relation was thus created in regard to whatever related to the land. Confidence was reposed that he would act in all things for the interests of his constituent. Good faith required he should have communicated these important facts, developed by the survey, before he permitted his constituent to sell. But even that which was certainly known, that it was mineral land with flattering prospects, was not communicated by Varnell, his agent, to Tayloe, their common constituent.

As for the other appellant, Foltz, it is very evident he had full knowledge of what was going on. Substantially he was a party with Norris in purchasing.

We fail to perceive any error in the record, and must affirm the decree.

Decree affirmed.[1]

ROCHESTER v. LEVERING.

1885. Supreme Court of Indiana. 104 Ind. 562.

Mitchell, J.—A complaint filed by John Levering against Madeline Rochester, and a cross-complaint filed by the latter against Levering, constitute the basis of the controversy exhibited in the record in this case.

The complaint seeks a recovery upon an account exhibited with it, for services rendered, money loaned, paid out and expended by the plaintiff at the defendant's instance and request. The cross-complaint charges that from the year 1862, down to and including the year 1878, the plaintiff, Levering, was in the relation of agent and

[1] An agent. for the transmission of money is liable for any loss occurring through his failure to notify his principal of the manner of transmission. Clark v. Bank of Wheeling, 17 Pa. St. 322.

[illegible]

[illegible] LEVERING.

[illegible]

Mr. [illegible]'s complaint filed by John Levering against Madeline Redwine, and a [illegible] complaint filed in the same against Levering, constitute the [illegible] of the controversy submitted on the record in this case.

The complaint seeks a recovery upon an account exhibited with it for services rendered, moneys loaned, paid out and expended by the plaintiff at the defendant's instance and request. The cross-complaint charges that from the year 1865 down to and including the year 1878 the plaintiff, Levering, was in the relation of agent and

[illegible]

attorney to the defendant, Mrs. Rochester, having in charge the control and management of all her property and business, and that while in such relation he so managed her affairs and business and dealt with her as that upon an accounting and proper adjustment of their business a large sum of money, amounting to over $20,000, would be due her.

Upon issues made the case was heard and a special finding of facts, with conclusions of law stated thereon, filed by the court. With the facts as found, both parties are content, while each excepted to and are yet, by assignment of errors and cross-errors, respectively, contending against some of the conclusions of law.

The controversy involves a great variety of transactions, covers a period of more than eighteen years of business, and required the adjustment of an account aggregating but little short of $80,000. That it was reduced to the order and symmetry in which the special findings present it, is abundant evidence that the case was tried with extraordinary care and ability.

The facts upon which the first conclusion of law is based are, in substance, as follows: Mrs. Rochester, in addition to a large amount of other property, was the owner of thirty acres of land in the extreme south part of the city of Lafayette. Through her agents, Mr. Levering and his brother, she sold fifteen acres off the south side of this tract to Owen Ball for $4,000, in August, 1865. About the same time Ball offered to purchase the remaining fifteen acres for $3,500. This was refused. The appellant and Mr. Levering about that time went to Ball and solicited him to purchase the remaining fifteen acres for $4,000. Ball again offered $3,500, and would give no more. Mrs. Rochester then requested the appellee to find a purchaser for this tract and other unimproved lands owned by her, which she was anxious to sell. This the appellee tried to do, but the highest offer made for the tract in question was $3,500 by Ball. The tract was unfenced, unimproved and unproductive, and its main value was probable and prospective for platting into town lots with a view to selling it in lots. The court finds it difficult to state the real value of the tract at the time of the sale to Levering, hereinafter mentioned, but its approximate value at that time was found to be $4,500.

It is found that on the 19th day of February, 1869, while Mr. Levering was acting as the confidential agent of Mrs. Rochester, and while acting as her agent to sell the tract of land mentioned, he proposed to buy the land from her himself, at the price of four thousand dollars, agreeing that he would lay it out into lots, as an addition to the city of Lafayette, and that he would pay the price mentioned, with six per cent. interest, in money or notes, out of the proceeds of sales of the lots.

He represented to her that, in his opinion, it would be better for her to sell it to him than to hold it. It is found by the court that he

fully and correctly communicated to her all the facts of which he had knowledge about the tract of land and its value, and that he made no misrepresentation, nor did he conceal from her any fact concerning the land or its value, and that the price offered, so far as could then be known, was not manifestly inadequate. Mrs. Rochester had full confidence in the judgment of her agent, and relied upon his advice as to the propriety of making the sale, and concerning the value of the land.

Under these circumstances, and without consulting any person other than Mr. Levering, the appellant sold the tract to him on the terms proposed, and executed to him a warranty deed therefor. As evidence of his obligation to her for the purchase-price, he executed an instrument of writing signed by him, in which the purchase of the land is recited, and in which his agreement to pay is stated as follows: "I am to lay out said land into town lots, as an addition to the city of Lafayette, and will pay to said Madeline Rochester, out of the proceeds of the sales of said lots, in money or promissory notes taken, the sum of four thousand dollars, with interest at the rate of six per cent."

It is found that the tract was laid out into sixty-nine town lots, in the month of April, 1869; that a plat was filed, calling it "John Levering's addition to Lafayette," and that from May 28th, 1869, to August 9th, 1874, Levering sold thirty-nine lots, receiving for principal and interest from such sales, in the aggregate, $9,010.85, leaving thirty lots still unsold.

The purchase-money was never actually paid by Levering, but in a settlement had on the 15th day of June, 1874, which was afterwards found to be erroneous, Levering credited Mrs. Rochester's account with the $4,000 and the accrued interest thereon, according to the contract as modified. The appellant paid out about $600 for the improvement of Fourth street, which ran along or through the tract; but this sum was paid by using a judgment, which belonged to Mrs. Rochester, against one Austin. This judgment was used by Mr. Levering, upon an agreement with Mrs. Rochester that he would change his obligation to her so as to allow ten per cent. interest on the $4,000 purchase-money for the land, instead of six. This was accordingly done.

The court also found that Levering had a well appointed and centrally located office in the city of Lafayette, with two or three clerks constantly in attendance; that by reason of these facilities, and his extensive business connections and his energy and industry, he had great advantages in effecting sales of real estate; that soon after the purchase from Mrs. Rochester, Fourth street, lying along the east line of the addition, laid out of the land purchased, was improved, and on that account lots in that locality became more desirable; that many of them were sold at prices largely in excess of the price paid for the land in bulk. The court finds it impossible to state how

much of the advanced price obtained was due to the superior facilities and the individual energy, industry and efforts of Levering.

Among other facts found, in addition to those above recited, which cast some light on the transaction, it may be stated that it was found that Mrs. Rochester was a lady of superior intelligence, but inexperienced in business matters, or in relation to the value of real estate; that she had entire confidence in the judgment and honesty of Mr. Levering; that he generally explained all business transactions to her, and that he had the entire management and control of her property and business; that he kept her accounts, which were always open to her inspection, and that she frequently examined them.

The first conclusion of law stated by the court was, that the sale of the land was valid and binding and free from actual or legal fraud, and that the plaintiff Levering's account should be charged with the sum of four thousand dollars, the purchase-price of the land, as so much money received by him at the date of the sale.

The conclusion of law which affirms the validity of this sale is the chief subject to which the appellant's argument is directed. It may be remarked, that so far as the contention relates to sales by a trustee or other person having a power or agency to sell property, which, in the execution of such agency, the agent or trustee either directly or indirectly sells to himself, the argument is not deemed to be relevant to the case under consideration. That an agent to sell property cannot, either directly or indirectly, become the purchaser from himself, and that such sale is voidable absolutely at the election of the principal or beneficiary, without regard to its fairness, are propositions inflexibly established.

The facts found do not make this a case of that description. While they disclose a relation of the closest and most confidential character between principal and agent, so far as the general management of the financial and business affairs of the principal were concerned, they also show that the agent had no power to sell, and that he did not, in fact, make the sale. The agency with respect to the particular tract of land is stated in the following language: "That said Madeline was desirous of selling this tract, as well as her other unimproved land, and requested said plaintiff to find a purchaser therefor, which he tried to do; * * * that while acting as the confidential agent of said Madeline, and her agent to sell said fifteen acre tract, defendant proposed to buy it himself." Fairly interpreted, this means that while in the relation of general confidential business agent to the appellant, Mr. Levering was requested to find a purchaser for the land who would pay a fixed price, and while so acting as agent to sell he proposed to purchase the land from his principal and negotiate with her the purchase which is now the subject of controversy.

The case is one arising out of a transaction between a confidential

agent and his principal, who purposely and intentionally dealt with each other concerning a subject-matter involved in the agency. The result of the negotiation between the two was, that the principal consciously and knowingly transferred to her confidential agent the land in controversy at a stipulated price.

While a transaction of the character disclosed is not necessarily voidable at the election of the principal, a court of equity, upon grounds of public policy, will, nevertheless, subject it to the severest scrutiny. Its purpose will be to see that the agent, by reason of the confidence reposed in him by the principal, secures to himself no advantage from the contract. When the transaction is seasonably challenged, a presumption of its invalidity arises, and the agent then assumes the burden of making it affirmatively appear that he dealt fairly, and in the richest of faith imparted to his principal all the information concerning the property, possessed by him.

The confidential relation and the transaction having been shown, the onus is upon the agent to show that the bargain was fair and equitable, that he gave all the advice within his knowledge pertaining to the subject of the sale and the value of the property, and that there was no suppression or concealment which might have influenced the conduct of the principal. McCormick v. Malin, 5 Blackf. 509, 522; Cook v. Berlin, etc., Co., 43 Wis. 433; Porter v. Woodruff, 36 N. J. Eq. 174; Young v. Hughes, 32 N. J. Eq. 372; Farnam v. Brooks, 9 Pick. 212; Moore v. Mandlebaum, 8 Mich. 433.

As applicable to cases of the character under consideration, the rule is succinctly stated by a learned author in the following language:

"Passing to dealings connected with the principal's intervention, in any contract of purchase or sale with the principal, or other transaction by which the agent obtains a benefit, a presumption arises against its validity which the agent must overcome; although this presumption is undoubtedly not so weighty and strong as in the case of a trustee. The mere fact that a reasonable consideration is paid and that no undue advantage is taken, is not of itself sufficient. Any unfairness, any underhanded dealing, any use of knowledge not communicated to the principal, any lack of the perfect good faith which equity requires, renders the transaction voidable, so that it will be set aside at the option of the principal. If, in the other hand, the agent imparted all his own knowledge concerning the matter, and advised his principal with candor and disinterestedness as though he himself were a stranger to the bargain, and paid a fair price, and the principal on his side acted with full knowledge of the subject-matter of the transaction, and of the person with whom he was dealing, and gave full and free consent—if all these are affirmatively proved, the presumption is overcome, and the transaction is valid." 2 Pom. Eq. Jur., § 959.

Subject to the burdens thus imposed, as was stated in Fisher's Ap-

peal, 34 Pa. St. 29, "it never has been supposed that a principal might not sell to his agent, or the client to his attorney; and that their titles, thus acquired, would not be good in the absence of fraud on their part."

In the light of the foregoing principles we may now briefly recur to the facts.

Mrs. Rochester and her agent called on Mr. Ball, who had bought half the thirty-acre tract, and solicited him to purchase the remaining fifteen acres at the price of four thousand dollars. He refused to pay more than thirty-five hundred. The agent, then being solicited to find a purchaser, was unable to secure an offer in excess of that made by Ball. The property being unproductive, its value purely prospective and largely contingent on events that might or might not happen, such as the growth and improvement of the city to which it lay contiguous, and the demand which might arise for lots in that direction, can it now be said, after this lapse of time, that the price paid was not fair?

That it was difficult to ascertain the real value of the land with much certainty at the time of the sale, is disclosed in the special finding of facts, and that it was necessarily so is inherent in the very nature of the case. Considering the length of time which intervened from the sale until the investigation was set on foot, the condition of affairs at the time the sale was made, the inflation in values, and the speculation in real estate which ensued, and continued until the latter part of 1873, covering the period during which substantially all the lots disposed of were sold by Levering, and the obstacles which lay in the path of the investigation are apparent. That the approximate value, as arrived at under these circumstances, is stated to have been forty-five hundred dollars fully justifies the further statement that the price paid was not manifestly inadequate, in effect that the price was fair. As was said by Mr. Justice Story, in Prevost v. Grantz, 6 Wheat. 481, "length of time necessarily obscures all human evidence; and as it thus removes from the parties all the immediate means to verify the nature of the original transactions, it operates by way of presumption, in favor of innocence, and against imputation of fraud. It would be unreasonable, after a great length of time, to require exact proof of all the minute circumstances of any transaction, or to expect a satisfactory explanation of every difficulty, real or apparent, with which it may be encumbered."

When it is remembered that the transaction was had in February, 1869, and that it was permitted to stand unchallenged through all the changes in the situation and fluctuation of prices until January, 1883, we think all that can be required of the defendant is to make it certain to a common intent that the price paid was fair and equitable. This has been done. That the purchaser, by the succession of events, the rise in value of the property on his hands, coupled with his energy, ability and industry, and his facilities for selling

the lots, sold the property for more than he paid for it, cannot now be taken as the measure of its value at the time of the purchase, nor can it be assumed on that account that the plaintiff was over-reached in the purchase. Fisher's Appeal, *supra.* Having paid a fair price for the property, and fully communicated to his principal all the facts within his knowledge about the land and its value, misrepresenting nothing, concealing nothing, the appellee has brought the transaction within the rule which authorizes it to stand.

As related to the subject we are considering, it was urged on the argument that the obligation given for the purchase price was such that the purchaser came under no absolute contract to pay for the land, that his liability to pay was contingent upon his realizing the amount stipulated to be paid from sales of lots, and that this was so unfair that the sale should have been set aside.

We do not think the contract admits of the construction contended for. The contract recited that the land was conveyed at the price of $4,000. The import of this was a debt for a specified amount then presently due. The unilateral stipulation contained in the writing, to the effect that the purchaser would lay the land out into lots, specifying no time, and pay the amount with interest out of the proceeds of sales in money or promissory notes, was, if of any force whatever, at most an agreement on his part that he would do so within a reasonable time.

It is insisted that because the Austin judgment which belonged to Mrs. Rochester was used by her agent to pay for the street improvements, and because the amount of the purchase price of the land and the accrued interest thereon were liquidated by being included in a partial settlement made in 1874, which was afterwards found to be erroneous, an imputation of bad faith in making the purchase of the land arises. These were all matters occurring long after the transaction which it assailed was completed, and cannot be supposed to have been contemplated. They did not exist at the time the land sale was made, and could, consequently, have exerted no influence upon it, one way or the other. They were matters only relevant to be considered in the adjustment of the accounts between the parties, and in that connection they were considered by the learned court and properly adjusted. The sale of the land cannot be affected by independent dealings or transactions which were had afterwards, and which had no relation to the principal transactions here involved. Sherman v. Hoagland, 54 Ind. 578.[1] * * *[2]

Judgment affirmed.

[1] A portion of the opinion is omitted.
[2] See Curry v. King (Cal.), 92 Pac. 662.

STERLING v. SMITH.

1893. Supreme Court of California. 97 Cal. 343.

McFarland, J.—In her complaint, the plaintiff averred that, during a certain period, defendant was her confidential agent in purchasing and selling real estate and in transacting other business for her; that as such agent and for such business he received from her, during said period, the sum of $11,920, or thereabouts; that during said period he paid out and expended for her the sum of $6,225, or thereabouts, leaving a balance of $5,695, with interest, due her from him; and for this last sum she prays judgment. The defendant answered, admitting the agency as alleged in the complaint, but denied that he had received of plaintiff's money more than $9,920.70. The court found the defendant had received of plaintiff's money only the said amount of $9,920.70. But the defendant averred that, in addition to the said sum of $6,225 paid out by him for plaintiff, as averred in the complaint, he also paid out for her the further sum of $3,600. He averred that this latter sum of $3,600 had been paid out by him for her in purchasing certain interests in what is called generally the Kansas Street Syndicate, which afterwards became a corporation, and was engaged in the purchase and sales of land, principally at Pasadena, California. The facts as to this syndicate, and the expenditure of money of plaintiff by defendant in connection with the same, are stated in great detail in the answer. The court found against the defendant as to the said $3,600 alleged to have been expended with said syndicate, and refused to allow defendant for the same, and entered judgment for plaintiff upon the basis of allowing defendant, as against said sum of $9,920.70 only the sum of $6,503.75. Defendant appeals from the judgment, and the only point made by him for a reversal of the judgment is the refusal of the court to allow him for said amount paid out in said syndicate. The court found that, prior to the time when defendant made the purchase of interests from said syndicate for plaintiff, "he had already become a member of said syndicate, and was one of the joint owners of the property of said syndicate, and of the interests so purchased by him for her; that he did not inform her, and she did not know at the time she made said purchase, that he was a member of said syndicate, and a part owner of the interests he was about to purchase for her, but led her to believe he was not a member of said syndicate;" and that at the time defendant made said purchase for plaintiff, the syndicate was indebted in a large amount, exceeding $55,500, which defendant had been instrumental in incurring; and that he did not notify her of said debt, but represented to her that she would not have any calls to pay if she became a member of the syndicate.

The main contention of appellant is, that the findings above referred to are entirely outside of any issues made by the pleadings, for the reason that the complaint does not contain any allegation of facts constituting fraud of any character, or any allegation that appellant was a member of the syndicate, or that she did not know of his having an interest therein, etc., which allegations appellant contends were absolutely essential, in order to admit evidence upon the subject. This position, however, is not tenable. Our system of pleading does not include a replication, and, under § 462 of the code of civil procedure, "the statement of any new matter in the answer, in avoidance or constituting a defense or counterclaim, must on the trial be deemed controverted by the opposite party." The averments in the answer as to the investments in the syndicate constituted new matter; and if a replication were allowable, the plaintiff, by such a pleading, could have set up the facts found by the court as aforesaid. But under our system of pleading, she is deemed to have set up such facts. No doubt, when a cause of action rests upon fraud, the facts constituting the fraud must be set up in the complaint; but such was not the case here, for the necessity of proving fraud appeared only after the answer of the defendant. And a plaintiff is in that position with respect to all new matters set up in the answer. (Williams v. Dennison, 94 Cal. 540; Grangers' Business Ass'n v. Clark, 84 Cal. 204; Colton Land, etc., Co. v. Raynor, 57 Cal. 588; Curtiss v. Sprague, 49 Cal. 301; Canfield v. Tobias, 21 Cal. 349.) In Colton Land, etc., Co. v. Raynor, 57 Cal. 588, the court, in speaking of said § 462, say: "This has always been regarded as allowing a plaintiff, in reply to such new matter, to introduce on the trial any evidence which countervails or overcomes it, as if it were inserted in a replication, and pleaded with all the precision and fullness which the strictest rules of law ever required."

With respect to respondent's criticism of the findings, it is sufficient to say that, in our opinion, they are full and specific enough, and that no further findings were necessary.

As to the merits of the case, it was not necessary for the respondent to prove or for the court to find expressly that the acts done by appellant were done with fraudulent and wrongful intent; because the acts themselves were of such a character, considering the relationship of the parties, that the law imputes fraud. In Pomeroy's Equity Jurisprudence, § 959, the rule, as between principal and agent, is stated as follows: "Equity regards and treats this relation in the same general manner, and with nearly the same strictness, as that of trustee and beneficiary. The underlying thought is, that an agent should not unite his personal and his representative characters in the same transaction; and equity will not permit him to be exposed to the temptation, or brought into a situation where his own personal interests conflict with the interests of his principal. In dealings without the intervention of his principal, if an agent for the pur-

pose of selling property of the principal, purchases it himself, or an agent for the purpose of buying property for the principal buys it from himself; either directly or through the instrumentality of a third person, the sale or purchase is voidable; it will always be set aside at the option of the principal; the amount of consideration, the absence of undue advantage, and other similar features are wholly immaterial; nothing will defeat the principal's right of remedy, except his own confirmation after full knowledge of all the facts." (See also, Burke v. Bours, 92 Cal. 108.)

The objection that the findings are insufficient to support the judgment, because they do not contain an express statement that the respondent did not ratify the investment in the syndicate, cannot be maintained. The findings clearly go upon the theory that there was no such ratification; and, moreover, there was no evidence tending to show any ratification after respondent had learned all the facts about the transaction. Appellant was not entitled, upon the eidence, to a finding that there had been such ratification. Neither do we think that the stipulation of counsel referred to in finding 14 can be held as estopping the respondent from attacking the validity of the investment in the syndicate; and the trial was not conducted upon any such theory. There are no other points which we deem it necessary to notice in detail.

Judgment affirmed.[1]

SCRIBNER AND POTTER v. COLLAR.

1879. SUPREME COURT OF MICHIGAN. 40 Mich. 375.

GRAVES, J.—The plaintiffs recovered judgment against defendant for certain commissions, and a review of the proceedings is asked upon a case made.

The defendant owned certain real estate he wished to sell or exchange, and he employed the plaintiffs to aid him. The arrangement was in writing and signed by defendant in a book kept by plaintiffs for such entries. After designating the property and the price and setting down the amount to stand on mortgage and the time of credit and rate of interest, it proceeded as follows:

[1] "If the agent practices upon the principal any deception (whether intentional or not) whereby the principal is misled and damaged and the agent would reap any benefit, the transaction is fraudulent and the courts will not allow the agent to take or retain the benefit." Powell, J., in Williams v. Moore-Gaunt Co., 3 Ga. App. 756, 760.

See particularly Powell and Thomas v. Jones, 21 T. L. R. 55, and discussion in 18 Harv. Law Rev. 309.

The agent must not mingle the principal's property with his own. Brackenridge v. Holland, 2 Blackf. (Ind.) 377, 383.

"I hereby place the above described property in the hands of Messrs. Scribner and Potter for sale, or exchange for farm property at my option, and agree to pay them a brokerage commission of 2½ per cent. when sale or exchange is made, and further agree to render all the assistance I can in making such sale or exchange."

At the same time this arrangement was made, the plaintiffs were under a similar retainer from persons by the name of Warren, who had a farm they wished to sell or exchange. Of this fact the defendant was ignorant.

In the course of a few weeks the plaintiffs facilitated the opening of negotiations between the Warrens and defendant, and the parties not long after, through the aid of plaintiffs, consummated a trade, the Warren property, however, being granted to Homer A. Collar, a son of defendant. There were some special circumstances connected with the substitution of the former for the latter as grantee which are somewhat obscure, to say the least, but the result is not governed by them. After this trade it was ascertained by the defendant that during the negotiation the plaintiffs were acting under retainer from the Warrens, and for an agreed compensation, and he objected in the court below and objects here that the fact is a complete answer to the action.

The plaintiffs' counsel have not contested and do not contest the principle that the same person cannot be the agent of both parties in reference to a matter where discretion is to be exercised upon interests which are conflicting. He contends that the plaintiffs were not in that situation, but on the contrary that the retainer taken by the plaintiffs required them to do no more than bring the parties together, and that in this the interests of defendant and the Warrens were concurrent and not conflicting; that these persons were left to negotiate as they pleased and uninfluenced by the plaintiffs; that no opportunity existed for any infringement of good faith, and that it was just and lawful to take employment and pay from both sides. There is nothing in the record to impugn the personal fairness and integrity of purpose of the plaintiffs in this transaction, and the only question is whether the undisclosed arrangement to act for each side so accords with public policy as to afford a ground of action to recover pay for the service. There is some contrariety of decision in regard to the right to accept a double retainer and double pay, even when the fact is disclosed to both parties. Farnsworth v. Hemmer, 1 Allen 494; Walker v. Osgood, 98 Mass. 348; Pugsley v. Murray, 4 E. D. Smith 245; Everhart v. Searle, 71 Pa. St. 256; Raisin v. Clark, 41 Md. 158; Schwartze v. Yearly, 31 Md. 270; Morison v. Thompson, L. R. 9 Q. B. 480, 10 Eng. 129; Rice v. Wood, 113 Mass. 133; Lynch v. Fallon, 11 R. I. 311.

But the cases are nearly, if not quite, uniform that where the double employment exists and is not known, no recovery can be had against the party kept in ignorance, and the result is not made to

turn upon the presence or absence of designed duplicity and fraud, but is a consequence of established policy.

The opinion has been expressed that where the person is employed merely as a middleman to bring persons together and has no duty in negotiation and has not engaged his skill, his knowledge or his influence, he may lawfully claim pay from both parties. Rupp v. Sampson, 16 Gray 398; Siegel v. Gould, 7 Lans. 177. No doubt such cases may occur; but their exceptional character should appear clearly before they should be exempted from the general principle. In Walker v. Osgood, *supra,* the court explained Rupp v. Sampson and pointed out the distinction on which it proceded. The plaintiff was employed merely to perform a preliminary act. His sole office was to bring two specified persons together. The plaintiff's counsel in this case has mistaken, as I think, the construction due to the writing on which the case is based. The employment was not merely that defendant and some third party should be brought together for mutual negotiation with an option on defendant's part to do anything or nothing.

The writing placed the property for sale or exchange in plaintiffs' hands and then reserved an option as to whether the final disposition should be a sale or an exchange and expressly required defendant to afford the plaintiffs all the assistance he could in making such sale or exchange. The contract had large scope and went much further than to constitute the plaintiffs mere middlemen to bring some particular third person, or even any one in general, into a position to negotiate with the defendant. It conferred authority to negotiate and reposed trust and confidence and contemplated that the plaintiff's should act in defendant's interest and should exert their judgment and their influence in his behalf. Such was the contract entered into and there is no other to support a recovery, and the view most favorable to the plaintiffs is that the evidence of their claim did not depart from it. The proof of a case not consonant to the writing would of course be of no avail. No other relation than that caused by this agreement is involved in the ground work of the alleged cause of action, and no showing of a different relation can be urged by plaintiffs to sustain their case. Whether they interfered more or less or not at all with the negotiations could not change the relations caused by the contract or increase or diminish their duty under it. If their judgment and influence were due to defendant, if they owed him the full measure of their skill and favor to assist him to reach a result most advantageous for him, it might well be that omission to interfere and take an active part would be a failure of duty, and this failure moreover might be a consequence of the adverse retainer. The parties employed might not be conscious of any bias and still be induced to maintain an inactive or neutral position instead of the helping and positive position bargained for. There might be this or that degree or extent of dereliction as a con-

sequence of the employment by the other side, and yet no actual moral lapse be involved.

It seems to me there is no escape here from the rule of policy before mentioned, and that the judge ought not to have submitted the case as he did upon the theory of plaintiffs' counsel. In view of the special circumstances disclosed by the record, a contrary result, were it admissible, would not be distasteful.

The judgment must be reversed with costs and a new trial ordered.[1]

Section 3.—Agent's Duty to Use Care and Skill.

FIRST NATIONAL BANK OF MEADVILLE v. FOURTH NATIONAL BANK OF NEW YORK.

1879. Court of Appeals of New York. 77 N. Y. 320.

Appeal from judgment of the general term of the supreme court, in the first judicial department, affirming a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, 16 Hun 332.)

This action was brought to recover damages alleged to have been occasioned by the negligence of the defendant in the performance of its duty, as agent for plaintiff, in collecting a draft sent to it for that purpose.

The facts appear sufficiently in the opinion.

Earl, J.,—On the 22d day of March, 1866, the National Bank of Crawford County, Pennsylvania, at Meadville, made and delivered to the plaintiff, a national bank located at the same place, a sight draft for $6,000, drawn upon Culver, Penn & Co., bankers in the city of New York. The plaintiff endorsed the draft and sent it by mail to the defendant, its corresponding bank in the city of New York, for collection and credit. The draft was received by the defendant on the morning of March 26, and was on the same morning presented by it to the drawees for payment. Upon such presentation it received from the drawees their check for the amount upon the Third National Bank of New York, where they kept their ac-

[1] *Accord:* Atlee v. Fink, 75 Mo. 100.

"The maxim that 'no man shall serve two masters' does not prevent the same person from acting as agent, for certain purposes, of two or more parties to the same transaction when their interests do not conflict, and where loyalty to the one is not a breach of duty to the other." Longworth, J., in Nolte v. Hulbert, 37 Ohio St. 445, 447.

"Two parties may always, by mutual consent, no matter how diverse their interests, make a third their agent." McCay, J., in Fitzsimmons v. Southern Express Co., 40 Ga. 330, 336.

presence of the employment by the other, does not by no actual moral turpitude be involved.

It seems to me there is no escape, both upon principle of policy before mentioned and that the judge under all the facts submitted the case as he did upon the theory of plaintiff's contributory negligence. In view of the special circumstances disclosed by the record, a contrary result, were it possible, should not be disturbed.

The judgment must be reversed with costs and a new trial ordered.

Section 3.—Agent's Duty in the Care and Skill.

FIRST NATIONAL BANK OF MEADVILLE v. FOURTH NATIONAL BANK OF NEW YORK

(1901. Court of Appeals of New York. 57 N. Y. 320.

Appeal from judgment of the general term of the supreme court, in the first judicial department, affirming a judgment in favor of plaintiff entered upon the report of a referee. Reported below, 4 Hun, 548.

This action was brought to recover damages alleged to have been occasioned by the negligence of the defendant in the performance of its duties as agent for the plaintiff, in collecting a draft sent to it for that purpose.

The facts appear sufficiently in the opinion.

EARL, J. — On the 21st day of March, 1896, the National Bank of Crawford County, Pennsylvania, at Meadville, made and delivered to the plaintiff, a national bank located at the same place, a sight draft for $2,000, drawn upon Culver, Penn & Co., bankers in the city of New York. The plaintiff endorsed the draft and sent it by mail to the defendant, its corresponding bank in the city of New York, for collection and credit. The draft was received by the defendant on the morning of March 26, and was on the same morning presented by it to the drawees for payment. Upon such presentation it received from the drawees their check for the amount upon the Third National Bank of New York where the said draft ac-

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Accord, Allen v. Pink, 10 Mo. 104.

The mere fact that one bank sends for collection items on persons who also keep accounts with it, does not create the relation of principal and agent between the two banks as to such items, so as to make the former liable for the default of the latter. Langworth v. Merchants' Nat. Bank, 38 Ohio St. 349, 352.

Two parties may stipulate in writing that their relation to each other shall be that of principal and agent, although in fact it is not such. McCoy v. Commissioners of Sinking Fund, 30 Ga. 130, 136.

count, and it delivered the draft to them. It did not present the check to the bank for payment on that day; but it was sent through the clearing-house and presented for payment the next day, the 27th. Culver, Penn & Co., failed on that day, and the bank refused to pay the check. The defendant then took the check, and on the same day returned it to Culver, Penn & Co., and received back the draft for which it had been given, and then formally demanded of them payment of the draft, and caused the same to be protested for non-payment; and on the next day, March 28, due notice of such non-payment was served by mail upon the plaintiff and also upon the drawer.

Upon these facts it cannot be disputed in this state that sufficient was done to charge the drawer. It was so decided, upon precisely similar facts, in Turner v. Bank of Fox Lake, 4 Abb. Ct. App. Dec. 434, and Burkhalter v. Second National Bank, 42 N. Y. 538. If therefore the whole duty of the defendant to the plaintiff was discharged, as claimed by the learned counsel for the defendant, by preserving the liability of the drawer upon the draft, then the judgment appealed from is wrong.

It is the duty of an agent who receives negotiable paper for collection, in case such paper is not paid, so to act as to secure and preserve the liability thereon of all the parties prior to his principal; and if he fails in this duty, and thereby causes loss to his principal, he becomes liable for such loss. But this is not the utmost limit of the agent's duty and liability. He may so act as to charge all the parties to the paper, and yet become liable for a loss occasioned by his negligence. The rule which will measure the diligence which is exacted of a holder of such paper, in order to charge the prior parties, will not always measure the diligence which is required of a collecting agent in the discharge of his duty to his principal. 1 Dan. on Neg. Inst., § 330.

Suppose an agent receives for collection from the payee a sight draft. No circumstance can make it his duty, in order to charge the drawer, to present it for payment until the next day. He has entered into no contract with the drawer, is not employed or paid by him to render him any service, and owes him no duty to protect him from loss. What is required to be done to charge the drawer is simply a compliance with the condition attached to the draft, as if written therein; and that condition is in all cases complied with by presentation, demand and notice, on the next day after receipt of the draft. But suppose the agent, on the day he receives the draft, obtains reliable information that the drawee must fail the next day, and that the draft will not be paid unless immediately presented; what then is the duty he owes his principal, whose interests for a compensation he has agreed with proper diligence and skill to serve in and about the collection of the draft? Clearly, all would say, to present the draft at once; and if he fails to do this, and loss ensues,

he incurs responsibility to his principal; and yet the drawer would be charged if it was not presented until the next day. Where an agent receives a bill for collection, payable some days or months after date, in order to charge the drawer, he need not present it for acceptance until it falls due; and if he then presents it and demands payment, and protests it, and gives the notice, the drawer is held; and yet in such a case he owes his principal the duty to present the bill for acceptance at once, and if he fails in such duty, and loss ensues to his principal, he becomes liable for such loss. It was so held in Allen v. Suydam, 17 Wend. 368. That case was taken to the Court of Errors, and again appears in 20 Wend. 321, and although the judgment was reversed upon the question of damages, the same rule was laid down as to the duty and liability of the agent. The chancellor said: "If the receiving a bill by an agent, to collect, implies an obligation on his part to take the necessary steps to charge the drawer and indorsers, by protest and notices, in case it is not accepted and paid by the drawee, I do not see why due diligence on the part of the agent, in procuring the acceptance of the drawee without delay, when it may be necessary or beneficial to the interests of the principal, should not also be implied, as it is the duty of a faithful agent to do for his principal whatever the principal himself would probably have done, if he was a discreet and prudent man. Even where the principal is habitually negligent in attending to his own interests, it forms no excuse for similar negligence on the part of his agent." In the same case, Senator Verplanck said: "It seems to be the general commercial law of the civilized world, that when a bill is payable at a day certain, the drawer and indorser are not discharged, if the bill is not presented until the day of payment. Yet it is still the duty of the agent for collection to present the bill for acceptance without delay, and to give immediate notice of refusal to accept." He said further: "The principle is familiar that an agent for pay is bound to use such means, care, skill and precaution as are adequate to the due execution of his trust. He must use the ordinary diligence of a skillful and prudent man in such affairs."

The rule of diligence applicable to an agent for the collection of negotiable paper, which has been stated, was fully and explicitly recognized in the case of Smith v. Miller, reported in 43 N. Y. 172; s. c. 3 Am. 690, and again 52 N. Y. 545. In that case the defendants sent to the plaintiffs, for the purpose of paying them for a bill of goods, a draft drawn by them upon Place & Co., of New York. On the same day the plaintiffs received the draft, they presented it to the drawees for payment, and received their check upon a New York bank for the amount, and delivered up the draft. The check would have been paid if presented on that day, but it was not presented until the next day, and, in the meantime, Place & Co. having failed, the bank refused to pay the check. Suit was then commenced by the plaintiffs against the defendants for the price of the bill of

goods, and it was held that the plaintiffs could not recover, upon two grounds: 1. Because they did not protest the draft and give notice of the non-payment thereof to the drawers. 2. Because of their negligence in not presenting the check for payment upon the day they received it, although they had but two hours on that day in which to present it. The first ground does not exist here; but the last does. In 43 N. Y. 176, Judge Allen, after speaking of the duty which the payee of a check owes to the drawer, said: "But the duty of the plaintiffs to the defendants is not determined by that rule of commercial law. That rule has respect only to the contract and liability of the parties to the instrument. When a check is taken instead of money, by one acting for others, as was done by the plaintiffs, a delay of presentment for a day, or for any time beyond that within which with proper and reasonable diligence it can be presented, is at the peril of the party thus retaining the check and postponing presentment, as between him and the persons in interest whom he represents." In 52 N. Y. 549, Judge Rapallo said: "The plaintiffs had received from the drawees of the draft the means of obtaining the amount thereof, and by their own laches these means became unavailable, and the amount was lost both to them and the defendant."

In the case of Turner v. Bank of Fox Lake and Burkhalter v. Second National Bank, the actions were against the drawers of the bills; and the sole question involved was whether they had been properly charged. The case of Smith v. Miller is not in conflict with them. That was an action against the collecting agent for breach of his duty; and what was decided in that case, or said in the opinions written therein, was in entire harmony with the law as everywhere laid down. The rule as recognized is not unjust or unreasonable or inconveniently uncertain. Here the defendant was bound to present this draft and demand the money thereon. It took a check. That placed in its hands the means of procuring the money at once. It should have presented the check for payment or certification as soon as with reasonable diligence it could, and the delay was at its peril. There is nothing in conflict with these views in Bank of Washington v. Triplett, 1 Pet. 25, and West Branch Bank v. Fulmer, 3 Penn. St. 402, to which our attention has been called. The question here discussed was not involved in those cases.

All the facts as to the draft and the check are set out in the complaint and are found in detail by the referee, and hence it cannot be said that the complaint and the findings are not sufficient to sustain the recovery, unless difficulty is found in points yet to be considered.

It is said that the proof did not warrant the conclusion that the check would have been paid if presented on the 26th day of March. It is true, that the account of Culver, Penn & Co. was largely overdrawn on that day. But the bank had been in the habit for a long time of allowing them to overdraw during any day, they depositing

collaterals or making the account good when it was made up the next day. This arrangement was entirely at the discretion of the bank, and had been acted upon for a month or more. Under it the bank paid all the checks of Culver, Penn & Co., drawn on the 26th, and down to their failure on the 27th; and among the checks thus paid were some drawn after the one given to the defendant. It was therefore a justifiable conclusion that this check would have been paid if promptly presented. A cause of action was therefore established against the defendant; and the only remaining question is the rule of damages. The recovery was for the whole amount of the draft, with interest.

In 1 Dan. on Neg. Instr., § 329, the rule as to damages in such a case is laid down as follows: "The measure of damages which the holder is entitled to recover of the bank, or other collecting agent, who has been guilty of negligence or default in respect to it, is the actual loss which has been suffered. That loss is *prima facie* the amount of the bill or note placed in its or his hands; but evidence is admissible to reduce it to a nominal sum." In Borup v. Nininger, 5 Minn. 523, the same rule is laid down, and it is said: "The defendants may mitigate the damages by showing either the solvency of the maker, the insolvency of the endorser, or that the paper was partially or wholly secured, or any other fact that will lessen the actual loss to the plaintiff; the real loss occasioned by the improper conduct of the defendant being the fact for the jury to arrive at in measuring the plaintiff's damages." In Allen v. Suydam, *supra,* the judge at the trial charged the jury that as they had no knowledge of what the amount of the damage was, except from the proof of the amount of the draft, they should find a verdict for the plaintiffs for the amount of the draft, with interest. This charge was upheld by the supreme court, and the rule was there laid down that the amount of the bill or note, in such a case, is the *prima facie* measure of damages. On account of this charge, the judgment was reversed in the Court of Errors, 20 Wend. 321. Two opinions were delivered, one by the chancellor for reversal, and another by Senator Verplanck for affirmance. These learned jurists did not differ materially as to the rule of damages, but they differed in its application to the facts of that case. The chancellor, writing the prevailing opinion, laid down the rule thus: "Where there is a reasonable probability that the bill would have been accepted and paid if the agent had done his duty, or where, by the negligence of the agent, the liability of a drawer or endorser, who was apparently able to pay the bill, has been discharged, so that the owner of the bill cannot legally recover against such drawer or endorser, I admit the agent, by whose negligence the loss has occurred, is *prima facie* liable for the whole amount thereof, with interest, as damages; unless he is able to satisfy the court and jury that the whole amount of the bill has not been actually lost to the owner, in consequence of such negligence;"

and he claimed that the facts in that case did not clearly show that the loss of the plaintiffs was the whole amount of the bill; and hence he reached the conclusion that the charge of the trial judge was wrong, and that a new trial should be granted, "to the end that no more damages may be recovered than such as a jury may believe it probable, for the evidence adduced, that the plaintiffs may have sustained from the negligence."

When the agent so deals with the draft as to secure and preserve to his principal all his rights and remedies against the prior parties to the bill, he is liable only for the actual or probable damages which his principal has sustained, in consequence of his negligence; and so the rule was recognized to be in Van Wart v. Woolley, 5 Dowl. & Ryl. 374. In Bank of Scotland v. Hamilton, cited in Allen v. Suydam, where the agent by his negligence in not sooner presenting a bill for acceptance became *prima facie* liable for the whole amount thereof, he was allowed in mitigation of damages a dividend which his principal would be entitled to out of the drawer's estate in bankruptcy.

In all these cases, the negligence of the agent being established, it is a question of damages, and the agent may show, notwithstanding his fault, that his principal has suffered no damages; and the recovery can then be for nominal damages only. He may show, in reduction of the damages, that if he had used the greatest diligence, the bill would not have been accepted or paid, or that his principal holds collaterals, or has an effectual remedy against the prior parties to the bill.

The defendant did not receive the check from the plaintiff and undertake to collect it; and this case must not be disposed of upon that basis. It received the draft for collection; and it was in reference to that that it came under obligation to the plaintiff to act with diligence. It presented the draft for payment, and for the purpose of paying the same, the drawees delivered to it an order upon a neighboring bank for the amount, and instead of getting the money upon the order at once, as it could have done, it negligently delayed until it could not. It had no more right to delay presenting the order for the money than it would have had to decline, when the draft was presented, to receive the money until the next day, in case the drawees had expressed a willingness to pay then. The gravamen of the plaintiff's complaint is that the defendant acted so negligently that it did not get payment of the draft when it had the means under its control, and the power, by the exercise of reasonable diligence, to do so.

But this fault of the defendant, so far as disclosed by the undisputed facts of this case, caused the plaintiff none but nominal damages. The defendant, as shown above, caused the drawer to be charged, and secured and preserved against it all the rights and remedies of the plaintiff; and the presumption, in the absence of proof,

is that the drawer was solvent, and responsible for the amount of the draft. Ingalls v. Lord, 1 Cow. 240; Allen v. Suydam, *supra*. But in this case we need not rest upon this presumption, as the complaint alleges that the draft could be collected from the drawer, if properly charged. The result is that the plaintiff has recovered against the defendant, as damages for its negligence, the full amount of the draft. But the draft is not by this judgment transferred to the defendant, and it is not subrigated to the plaintiff's rights and remedies thereon against the drawer; and the plaintiff still holds the draft, and for aught that appears in this case, can enforce it, or has enforced it, for the full amount against the drawer. To justify such judgment, the plaintiffs should have shown that the draft was wholly worthless, or that for some reason the responsibility of the drawer thereof was wholly unavailable to it. The plaintiff is entitled to indemnity, and no more, for the loss caused by the fault of the defendant, and it must show the extent of such loss.

It was said by the learned counsel for the plaintiff, upon the argument before us, that by the law of Pennsylvania the drawer was not charged upon the draft by what was done by the defendant. But that law was not proved; and in the absence of proof, we must assume that the common-law rule prevails there which prevails here. It was also stated that the plaintiff had sued the drawer upon the draft and failed to recover, because it was not properly charged. But there is also no proof of that.

Therefore, for the error as to the damages, the judgment must be reversed and a new trial granted, costs to abide event.

All concur, except Folger and Miller, JJ., not voting, and Church, Ch. J., absent.

Judgment reversed.[1]

HEINEMANN ET AL. v. HEARD ET AL.

1872. COURT OF APPEALS OF NEW YORK. 50 N. Y. 27.

APPEAL from judgment of the general term of the supreme court in the first judicial district, affirming a judgment in favor of defendants entered upon an order of the court at circuit directing a dismissal of the complaint. (Reported below, 58 Barb. 524.)

This action was brought to recover damages for an alleged breach of duty, upon the part of defendants, as plaintiffs' agent.

The plaintiffs are co-partners, carrying on business in the city of New York under the firm name of Heinemann & Payson.

The defendants are commission merchants and co-partners, carry-

[1] *Accord:* Merchants' Bank v. Stafford Bank, 44 Conn. 564. See Bank of Delaware Co. v. Broomhall, 38 Pa. St. 135.

ing on that business at Hong Kong and elsewhere in China, under the firm name of Augustine Heard & Co. In the year 1864 an arrangement was entered into between the plaintiffs and defendants, by which the latter were to become the correspondents of the former for the purchase of teas and silks in China for account of the plaintiffs. In order to put the defendants in funds for the purchase of teas and silks, a credit in favor of the defendants, with George Peabody & Co., of London, for £15,000 sterling, was obtained by plaintiffs. The plaintiffs gave defendants their first instructions to purchase by a letter dated the 23d December, 1864, addressed to the defendants at Hong Kong. It directed the investment of £5,000 in No. 1 re-reeled silk (if possible, all white), at 18s. sterling for humchuck, or 16s. sterling for No. 1 Loong Kong or Kow Kong, free on board; and £10,000 sterling in fair cargo Foochow Oolongs, at a price not exceeding 9d. (say 9d. sterling) per pound. These instructions were modified by a letter dated May 2, 1865, in these respects, namely: The limit of price for silk was increased five per cent.; and for the Oolongs the defendants were authorized to substitute fine Moyune teas from Canton or Shanghai, the usual assortment of fully fair cargo, at a price of 1s. 7d. per pound sterling, free on board, without freight and insurance; for the Ting Tai, 2d. per pound higher.

The first letter was received on the 22d February, 1865, and the second on the 7th of July, 1865. By its original terms the bills were to be drawn prior to the 1st July, 1865; the time was extended to September 1. The defendants were notified of the extension by the plaintiffs' letter of May 12, which notice was received by the defendants on the 6th July, 1865. No purchases were made by the defendants for the plaintiffs under these orders, nor any part of the credit used.

At this time there was a certain joint account arrangement on foot between the plaintiffs and the defendants, and the plaintiffs, in a letter dated June 6, 1865, advised the defendants as follows: "Any amount unused of our first credit of £15,000 you may apply for the benefit of the joint account arrangement." This letter was received August 8, 1865; no part of the credit, however, was applied. Other facts appear in the opinion.

Rapallo, J.— * * * The question in the case was one of due diligence, and we think that there was sufficient evidence to go to the jury on that point. The position cannot be maintained that fraud on the part of the agent is necessary to subject him to an action for neglecting to perform a duty which he has undertaken. An agent is bound not only to good faith but to reasonable diligence, and to such skill as is ordinarily possessed by persons of common capacity engaged in the same business. Story on Agency, §§ 183, 186. Whether or not he has exercised such skill and diligence is usually a question of fact; but its omission is equally a breach of

his obligation and injurious to his principal, whether it be the result of inattention or incapacity, or of an intent to defraud. In the case of Entwisle v. Dent (1 Exch. 822) there was an element of fraud as well as breach of duty; but the judgment of the court was not founded upon the fraud, nor could it be, as the action was for breach of the implied contract of the defendant to act according to instructions.

As an independent ground for sustaining the nonsuit, it is claimed, on the part of the defendants, that the order to purchase silk was discretionary, and that for that reason they are not responsible in damages for their failure to execute it.

By reference to the letter of December 23, 1864, it will be seen that no discretion was given whether or not to purchase. The order to invest £5,000 in silk of one or other of the particular descriptions mentioned, and at the prices named, was absolute. The only matter left to the discretion of the defendants was the selection of the silks as well as the teas. They were instructed to purchase either Cumchuck at 18s., or No. 1 Loo Kong, or Kow Kong, at 16s., and were requested to obtain all white if possible; otherwise, to separate the white from the yellow. No other matters were left to their discretion. It was their duty to select some of these descriptions, if they were to be obtained, and to use reasonable diligence in obtaining the required quantity in time to ship under the letter of credit. It is argued that as they had discretion in the selection of the silks, and had to determine whether it was possible to obtain all white, no period can be fixed as the time when they were bound to decide these matters and make the purchase. This argument is not satisfactory. The necessity of making a selection may have justified them in not accepting the first offer which they may have met with, and in looking further for the purpose of complying with the wishes of their correspondents; but it would not justify them in allowing all opportunities to pass, and the time to elapse within which they could purchase under the letter of credit. They were bound to make a selection within a reasonable time, and, at all events, before the time for shipping, under the credit, expired. The prices appear to have continued below their limit from the early part of June until the first term of the letter of credit had run out; yet they allowed all that time to elapse without making any selection. Such delay was certainly evidence of want of due skill and diligence, if attributable merely to a failure to come to a decision.

But the defendants do not, in their correspondence, take any such ground, or claim that they regarded themselves as having any discretion as to purchasing the silks and tea. On the contrary, in their letter of February 27, 1866, they say: "We were bound to follow your instructions for the investment of £15,000 credit first sent, and have already explained to you our reasons for not having purchased silk;" referring to their letter of December 14, 1865. They rest

Judgment reversed.

their justification wholly upon the ground that while the silks were below the plaintiff's limits they held off in the attempt to obtain them at still lower prices. They were scarcely justified, however, in persisting in this attempt until it became too late to ship under the letter of credit as originally drawn or as extended.[1] * * *

Judgment reversed.[2]

VARNUM ET AL. v. MARTIN.

1834. SUPREME JUDICIAL COURT OF MASSACHUSETTS. 15 Pick 440.

ASSUMPSIT against the defendant as an attorney at law, on an implied promise by him to do the business of the plaintiffs intrusted to him, with proper care, skill and fidelity, for a reasonable reward; and he is charged with negligence, carelessness and want of skill, whereby the plaintiffs lost a debt due to them.

The plaintiffs proved, that on August 27, 1832, a debt of $1,000 was due to them from E. M. Bissell, and that on that day they employed the defendant to collect it, and gave him directions to secure the demand by an attachment of personal property of Bissell. He made a writ, using a blank form in which the common counts in *indebitatus assumpsit* were printed with blank spaces for sums, names, dates, etc. There were no other counts. The writ directed the officer to attach property to the value of $1,200, and the *ad damnum* was laid at the same sum, but the defendant inserted a declaration for $12 only instead of $1,200. The officer served the writ, and property to the value of $1,200 was attached. In the court of common pleas, judgment was rendered *pro forma* for the plaintiffs, for the amount of their debt; from which judgment Bissell appealed, but neglected to enter his appeal, and the plaintiffs entered the action in this court for an affirmation of the judgment. The court refused to affirm it, because the declaration was erroneous in alleging the debt to be only $12. Bissell became insolvent in November subsequent to the attachment, and the plaintiffs never received any part of their demand.

The defendant proved, that formerly, in the blank forms of writs, the word hundred was printed. The plaintiffs proved in answer, that for a year or more previous to the making of the writ in question, the blank forms had omitted the word hundred, and that the blank forms used by the defendant for the June term previous

[1] The court here discussed the question of damages.

[2] The same test of care and skill was applied to one who invested money for another. De Hart v. De Hart, 70 N. J. Eq. 774.

In Kennedy v. McCain, 146 Pa. St. 63, it was decided that an agent investing money for his principal does not guarantee the sufficiency of the security.

See Page v. Wells, 37 Mich. 415, 420.

were of the new kind; and that at the time when he made the writ in question, he made another writ against Bissell in favor of two of the plaintiffs, in which he wrote the word hundred, the bank forms used in both cases being of the same kind.

It was conceded that the defendant was a man of competent skill in his profession, and the case was put upon the ground of negligence.

The jury were instructed, that the defendant was required to possess competent skill, and if there was a want of ordinary skill he would be liable; that an attorney is not liable for every mistake, but if there is a want of reasonable care and diligence, he is liable; and that if he exercises reasonable care and diligence, he is not liable.

The jury found a verdict for the plaintiffs. If the court should be of opinion that this evidence was not sufficient to support the verdict, a new trial was to be granted.

Per Curiam.—Whether the question of negligence should be determined by the jury, or by the court upon the facts being found or agreed, it is not necessary to consider; as we are of opinion, that the facts show a want of ordinary care and diligence on the part of the defendant, and that there is no good reason for disturbing the verdict. In a case like this, where care was required, it was the duty of the attorney to read over the writ, to see that it was correct. And the defendant cannot allege in excuse, the change which had taken place in the blank forms, for the later forms had been in use for a year or longer, and on the same day that the writ in question was made, he used one of these forms and inserted the word *hundred*.

Judgment on the verdict.

THOMAS v. DABBLEMONT.

1903. Appellate Court of Indiana. 31 Ind. App. 146.

This was an action against the appellant, a physician, for malpractice. The trial court gave certain instructions to the jury, to which appellant took exception.[1]

Comstock, J. (After deciding other questions.)—Objections were made and exceptions taken to the giving to the jury of certain instructions; with others, the seventh. It is as follows: "If a person holds himself out to the public as a physician, he must be held to possess and exercise ordinary skill and knowledge and care in his profession in every case of which he assumes the charge, whether in the particular case he receives a fee or not. Where an injury results from the want of ordinary skill or attention in the treatment of a

[1] The statement of the facts is abbreviated.

case the physician is responsible for such damage. Everyone who offers his services to the public as a physician or surgeon impliedly contracts with those who employ him that he possesses the skill and experience which is commonly possessed by others of the profession in good standing, and that he will exercise reasonable care and diligence and his best judgment in the application of his skill to the case undertaken, and that he will use such reasonable attention, diligence and care in administering to the case as are ordinarily required by those duly licensed and in good standing in the profession as necessary to qualify him as expert in such profession and to avoid responsibility for unskillful treatment or want of proper care and attention. In other words, he is required to bring to the case undertaken such reasonable skill, care and diligence as persons of the profession in good standing ordinarily possess and exercise in such cases, and he is liable for injuries resulting from a want of such skill, care and diligence, or from the failure to exercise his best judgment in the case undertaken. Such is the rule of law applicable to the profession. Such is the rule of law applicable to the profession. Such is the rule of law applicable to the profession

case, the physician is responsible for such injury. A person who offers his services to the public in any profession or business impliedly contracts with those who employ him that he is a person of the skill and experience which is possessed ordinarily by those who practice or profess to understand the same art or business which is generally required by those most conversant with that profession or employment as necessary to qualify him to engage in such business or profession successfully."

A physician is bound to possess and exercise only the average degree of skill possessed and exercised by members of the medical profession practising in similar localities. Baker v. Hancock, 29 Ind. App. 456; Gramm v. Boener, 56 Ind. 597; Smith v. Stump, 12 Ind. App. 359; Whitesell v. Hill, 101 Iowa 629, 70 N. W. 750, 37 L. R. A. 830; Becknell v. Hosier, 10 Ind. App. 5; Jones v. Angell, 95 Ind. 376. Under the foregoing decision the instruction complained of cannot be upheld. It fixes the standard of skill required too high.[2] * * *

Judgment reversed with instructions to sustain appellant's motion for a new trial.[3]

CITIZENS' LOAN FUND & SAVINGS ASSOCIATION v. FRIEDLEY ET AL.

1889. SUPREME COURT OF INDIANA. 123 Ind. 143.

MITCHELL, C. J.—This suit was instituted by the Citizens' Loan Fund and Savings Association against Harmon H. Friedley and the sureties on this bond to recover money alleged to have been lost to the loan association on account of the negligence and want of skill of the defendant Friedley while acting as the attorney of the association.

It is averred that the association made a loan of four hundred dollars to one of its share-holders in August, 1883, upon the faith of advice given by the appellee, its attorney, who certified to its officers,

[2] A portion of the opinion is omitted.

[3] "A physician and surgeon, by taking charge of a case, impliedly represents that he possesses, and the law places upon him the duty of possessing, that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where he practises and which is ordinarily regarded by those conversant with the employment as necessary to qualify him to engage in the business of practising medicine and surgery. * * * He is under the further obligation to use his best judgment in exercising his skill and applying his knowledge." Vann, J., in Pike v. Housinger, 155 N. Y. 201, 209.

See Lanphier v. Phipos, 8 C. & P. 475.

Regarding the duty of an architect see Chapel v. Clark, 117 Mich. 638.

in writing, that the title to certain real estate upon which the applicant for the loan proposed to execute a mortgage as security therefor was perfect, and available to secure the loan applied for.

It appears that the real estate was owned by the applicant and his wife as tenants by the entireties; that the loan was made in reliance upon the advice of the attorney; that the borrower subsequently died, his estate being insolvent; and that his widow successfully resisted a suit for the foreclosure of the mortgage, subsequently brought by the association, her defense having been predicated upon the ground that she signed the note and mortgage merely as the surety for her husband.

It is insisted that the complaint shows that the association sustained loss in consequence of the ignorance, carelessness, or unskilfulness of its attorney, and that the latter, with his sureties, must therefore respond to it in damages for the amount lost. No neglect or want of skill appears, except that the attorney was mistaken as to the law applicable to the state of the title of the borrower, and its availability as a security for the loan.

Attorneys are very properly held to the same rule of liability for want of professional skill and diligence in practice, and for erroneous or negligent advice to those who employ them, as are physicians, surgeons, and other persons who hold themselves out to the world as possessing skill and qualification in their respective trades or professions: Waugh v. Shunk, 20 Pa. St. 130.

The practice of law is not merely an art; it is a science which demands from all who engage in it, without detriment to the public, special qualifications, which can only be attained by careful preliminary study and training, and by constant and unremitting investigation and research. But as the law is not an exact science; there is no attainable degree of skill or excellence at which all differences of opinion or doubts in respect to questions of law are removed from the minds of lawyers and judges. Absolute certainty is not always possible. "That part of the profession," said Lord Mansfield in Pitt v. Yalden, 4 Burr. 2060, "which is carried on by attorneys, is liberal and reputable, as well as useful to the public, when they conduct themselves with honor and integrity; and they ought to be protected where they act to the best of their knowledge and skill. But every man is liable to error; and I should be very sorry that it should be taken for granted that an attorney is answerable for every error or mistake, and to be punished for it by being charged with the debt which he was employed to recover for his client": Watson v. Muirhead, 57 Pa. St. 161, 98 Am. Dec. 213; United States Mortgage Co. v. Henderson, 111 Ind. 24, 34.

An attorney who undertakes the management of business committed to his charge thereby impliedly represents that he possesses the skill and that he will exhibit the diligence ordinarily possessed and employed by well-informed members of his profession in the

Section 4.—Agent's Duty to Account

in writing, that the title to certain real estate was vested the applicant for the loan proposed to execute a mortgage to secure the loan applied for, and available to secure the loan applied for.

It appears that the real estate was owned by the husband and his wife as tenants by the entireties; that the loan was made in reliance upon the advice of the attorney that the borrower could safely do, for which being employed, and that he widow thereafter brought a suit for the foreclosure of the mortgage subsequently brought by the association, her defense being predicated upon the ground that she signed the note and mortgage merely as the surety for her husband.

It is insisted that the complaint shows that the association suffered loss in consequence of the negligence, carelessness, or unskillfulness of its attorney, and that he must with his surety must therefore respond to the damages for the amount lost. No implied or express contract between the attorney and plaintiff as to the law applicable to the case or the liability of the borrower and his availability as a security existed.

Although an attorney is held to the same rule of liability, for want of professional skill and diligence in practice, and the presumption is that he possesses the requisite skill and diligence in practice, and the presumption is that he possesses the requisite skill and diligence in practice, as are physicians, surgeons, and other persons who hold themselves out to the world as possessing skill and competency in their respective trades or professions. Wenger v. [illegible] 58 Pa. St. 150.

The practice of law is an intricate art. It is a science which requires much study and research to it, without detriment to the public good. [illegible] should not be attracted by garbled publications, study and research, and in case and unfamiliar investigation and research. [illegible] as the law is not an exact science, there is no attainable degree of skill or excellence to which all duly licensed attorneys or double [illegible] questions of law are removed from the minds of lawyers and judges. Absolute certainty is not always possible. "The practice of the profession," said Lord Campbell in Pitt v. Yalden, 4 Burr. [illegible] which is carried on by attorneys is liberal and reputable, as well useful to the public, when they endeavor themselves with honor and integrity and they ought to be protected where they are guilty of [illegible] and skill. But every man is liable to error, and it should be very sure that it should be taken for granted that a attorney is answerable for every error or mistake, and to be punished for it by being charged with the debt which he was employed to recover for his client." Wenger v. Shipherd, 58 Pa. St. 150; 98 Am. Dec. 277; Lemley Savings Bank v. Henderson, 121 Ind. 24, 24.

An attorney who undertakes the management of business entrusted to his charge thereby impliedly represents that he possesses the skill and that he will exhibit the diligence usually possessed and employed by well-informed members of the profession in the

conduct of business such as he has undertaken. He will be liable if his client's interests suffer on account of his failure to understand and apply those rules and principles of law that are well established and clearly defined in the elementary books, or which have been declared in adjudged cases that have been duly reported and published a sufficient length of time to have become known to those who exercise reasonable diligence in keeping pace with the literature of the profession: Hillegass v. Bender, 78 Ind. 225, and cases cited; Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262; Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134; Weeks Attorneys, §§ 284-289; Fenaille v. Coudert, 44 N. J. L. 286; Gambert v. Hart, 44 Cal. 542.

Thus it has been said: "He is liable for the consequences of ignorance or non-observance of the rules of practice of his court, for the want of care in the preparation of the cause for trial; whilst on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction:" Godefroy v. Dalton, 6 Bing. 460; Chitty on Contracts 817; Dearborn v. Dearborn, 15 Mass. 316. It is his own fault, however, if he undertakes without knowing what he needs only to use diligence to find out, or applies less than the occasion requires.

A lawyer is without excuse who is ignorant of the ordinary settled rules of pleading and practise, and of the statutes and published decisions in his own state; but he is not to be charged with negligence where he accepts as a correct exposition of the law a decision of the supreme court of his own state; nor can he be held liable for a mistake in reference to a matter in which members of the profession possessed of reasonable skill and knowledge may differ as to the law until it has been settled in the courts; nor if he is mistaken in a point of law on which reasonable doubt may be entertained by well-informed lawyers: Marsh v. Whitmore, 21 Wall. 178; Kemp v. Burt, 4 Barn. & Adol. 424.[1] * * *

The judgment is affirmed, with costs.[2]

Section 4.—Agent's Duty to Account.

BALDWIN BROTHERS v. POTTER.

1874. Supreme Court of Vermont. 46 Vt. 402.

General assumpsit. Plea, the general issue, and trial by the court, September term, 1873, Royce, J., presiding.

[1] A portion of the opinion dealing with the statutory right of a married woman to contract is omitted.

[2] For full discussion of the duties of an attorney at law see Savings Bank v. Ward, 100 U. S. 195.

The case was tried upon the following agreed statement of facts:

"The plaintiffs were merchants and partners, residing and doing business at St. Albans, Vt. They employed the defendant to solicit orders for and sell an article known and called 'prize candy' on commission. It was the practice of the parties, under said employment, for the defendant to solicit and take orders for said goods, and send such orders to the plaintiffs, who would thereupon send the candy to the parties ordering it, and charge it directly to the purchaser, on the plaintiff's books, and for the defendant, when convenient, to make collections in respect thereof for the plaintiffs, receipt therefor, notify the plaintiffs thereof, and pay the amounts collected over to the plaintiffs on demand.

"The defendant entered upon said business; and in November, 1870, and January, 1871, he sent orders for said candy for various parties in the state of New York to the amount of $103, and afterward, in August and September, 1871, collected the pay for the same as the plaintiffs' agent. In November and December, 1870, and February and March, 1871, the defendant sold and sent orders to the plaintiffs from various parties in the state of Massachusetts for said candy to the amount of $210.52, and afterward, in August and October, 1871, collected pay for the same as the plaintiffs' agent. During the years 1870 and 1871 the defendant sold and sent orders for said candy from various parties in Vermont to the amount of $215.57, and afterward, in August, September, and October, 1871, collected the pay for the same as the plaintiff's agent.

"On the delivery of said goods by the plaintiffs they charged the same to the purchasers on their books; and on receiving notice from the defendant of said collections they credited to such purchasers the amounts thereof. The plaintiffs delivered to the defendant four silver dollars and four silver half-dollars as samples of the prizes contained in certain of said prize candy packages, which, with the premium thereon, were of the value of $6.72, and which the defendant has never returned nor accounted for to the plaintiffs. It is agreed that the commission to which the defendant is entitled is equal to and shall be set off against items in the plaintiff's favor; specification not included in the amounts aforesaid.

"Said prize candies were of three kinds, and were known and called the 'Challenge,' 'Gem,' and 'United States Silver Coin,' and were put up in packages designed to be sold at retail for a certain price per package. Each package, in addition to a quantity of candy, contained a prize of some value; and the inducement to purchase one or more of the packages at retail was the chance of receiving with the candy a prize, some of which were of greater value, and some of less value, than the price paid. The plaintiffs, at St. Albans, put up said candy in packages, with a prize in each package, and put up the packages in boxes containing a certain number thereof. The plaintiffs sold said candy by the box only, and each box of the several

The case was heard upon the following agreed statement of facts:

"The plaintiffs were merchants and partners, residing and doing business at St. Albans, Vt. They employed the defendant to solicit orders for and sell an article known and called prize candy on commission. It was the practice of the parties under said employment for the defendant to solicit and take orders for said goods and send such orders to the plaintiffs, who would thereupon send the candy to the parties ordering it, and charge it directly to the purchasers, on the plaintiff's books, and not the defendant, who undertook to make collections in person or by letter of the plaintiffs, from time to time, notify the plaintiffs thereof, and pay the amounts collected over to the plaintiffs on demand.

The defendant carried on said business; and in November, 1870, and January, 1871, he sent orders for said candy for various parties in the state of New York to the amount of $103, and afterward, in August and September, 1871, collected the pay for the same as the plaintiffs' agent. In November and December, 1870, and February and March, 1871, the defendant sold and sent orders to the plaintiffs from various parties in the state of Massachusetts for said candy to the amount of $210.52, and afterward, in August and October, 1871, received pay for the same as the plaintiffs' agent. During the years 1870 and 1871 the defendant sold and sent orders for said candy from various parties in Vermont to the amount of $[illegible] and afterward, in August, September, and October, 1871, collected the pay for the same as the plaintiff's agent.

"On the delivery of said goods by the plaintiffs they charged the same to the purchasers on their books, and on receiving notice from the defendant of said collections they credited to such purchasers the amounts thereof. The plaintiffs delivered to the defendant four silver dollars and four silver half-dollars as samples of the prizes contained in certain of said prize candy packages, which, with the premium thereon, were of the value of $5.72 and which the defendant has never returned nor accounted for to the plaintiffs. It is agreed that the commission to which the defendant is entitled is equal to and shall be set off against items in the plaintiff's favor, specified in the schedules to the accounts aforesaid.

"Said prize candies were of three kinds, and were known and called the 'Challenge,' 'Gem,' and 'United States Silver Coin,' and were put up in packages designed to be sold at retail for a certain price per package. Each package, in addition to a quantity of candy, contained a prize of some value, and the inducement to purchase one or more of the packages at retail was the chance of receiving with the candy a prize, some of which were of greater value, and some of less value, than the price paid. The plaintiffs, at St. Albans, put up said candy in packages with a prize in each package, and put up the packages in boxes containing a certain number thereof. The plaintiffs sold said candy by the box only, and each box of the several

kinds contained the same amount of candy and the same prizes, and the prizes contained in each box were printed on the outside and on printed circulars; and cards were used by the plaintiffs, and the defendant as their agent, in connection with the sale thereof, stating particularly the kind and value of each article contained in the box as a prize; and each purchaser thereof from the plaintiffs was informed and knew the amount of candy and the exact number, value, and kind of articles as prizes contained in each box that he bought; and the plaintiffs knew that such purchasers intended to sell the same at retail, in the vicinity of the place of purchase, and that the prizes would be drawn as hereinbefore stated by the retail purchasers thereof.

"In respect to said business, and in the collection of said money, the defendant acted solely as the agent of the plaintiffs. On the 18th of October, 1871, the plaintiffs demanded of the defendant to account to them for the money collected by him as aforesaid, and said silver coins, and to pay over the amount thereof to them, but the defendant absolutely refused, and ever since hath refused so to do, and has never paid the same nor any part thereof.

"If upon the foregoing facts the court is of opinion that the plaintiffs are entitled to recover for the sums as stated, which were collected upon sales in the states of New York, Massachusetts, and Vermont, or either of said states, or for said silver coins, judgment shall be rendered for the plaintiffs for such sums, and interest from the date of collection of the money and the date of the delivery of the coin. If the plaintiffs are not entitled to recover in respect of any of said items, then judgment shall be rendered for the defendant to recover his costs."

An agreement was also made as to some of the provisions of the statutes of New York and Massachusetts relating to offenses against public policy in force at the time of said sales. The court rendered judgment for the plaintiff, *pro forma,* to recover the full amount claimed, with interest thereon as stipulated, and found that the defendant received said money in a fiduciary capacity and converted the same to his own use, and adjudged, *pro forma,* that the cause of action arose from the willful and malicious act and neglect of the defendant, and that he ought to be confined in close jail; to all which the defendant excepted.

Pierpont, Ch. J.—We do not find it necessary in this case to consider the question as to whether the contract for the sale of the property referred to, by the plaintiffs, to the several persons who purchased it, were contracts made in violation of law, and therefore void or not. This action is not between the parties to those contracts; neither is it founded upon or brought to enforce them. If those contracts were illegal the law will not aid either party in respect to them; it will not allow the seller to sue for and recover the price of the property sold if it has not been paid; if it has been paid, the

purchaser cannot sue for and recover it back. The facts in this case show that the purchasers paid the money to the plaintiffs, not to the plaintiffs personally, but to the defendant as the agent of the plaintiffs authorized to receive it. When the money was so paid it became the plaintiff's money, and when it was received by the defendant as such agent the law, in consideration thereof, implies a promise on the part of the defendant to pay it over to his principals, the plaintiffs; it is this obligation that the present action is brought to enforce; no illegality attaches to this contract. But the defendant insists that, inasmuch as the plaintiff could not have enforced the contracts of sale, as between himself and the purchaser, therefore, as the purchaser has performed the contracts by paying the money to the plaintiffs through me, as their agent, I can now set up the illegality of the contract of sale to defeat an action brought to enforce a contract on my part to pay the money that I as agent receive, over to my principal. In other words, because my principal did not receive the money on a legal contract, I am at liberty to steal the money, appropriate it to my own use, and set my principal at defiance. We think the law is well settled otherwise, and the fact that the defendant acted as the agent of the plaintiff in obtaining orders for the goods does not vary the case: Tenant v. Elliot, 1 B. & P. 2; Armstrong v. Toller, 11 Wheat. 257; Evans v. City of Trenton, 4 Zab. (N. J.) 764.

We think the certificate granted by the county court was properly granted. It has been urged in behalf of the defendant that the zeal with which he has defended this case shows that he intended no wrong; but we think the man who receives money in a fiduciary capacity, and refuses to pay it over, does not improve his condition by the tenacity with which he holds on to it.

Judgment of the county court affirmed.[1]

HAAS v. DAMON.

1859. Supreme Court of Iowa. 9 Iowa 589.

Stockton, J.—The plaintiff claims of defendant five hundred dollars for the price and value of three certificates of stock, or shares

[1] Regarding the duty of the agent to keep book accounts see Chicago Title and Trust Co. v. Ward, 113 Ill. App. 327.

An agent is liable to account only to his principal. Attorney-General v. Chesterfield, 18 Beav. 596.

"In mercantile agencies, and perhaps others, where the nature of the business requires the agent to keep various accounts of purchases and sales, or of receipts and expenditures, with his principal, he may be called upon by his principal, in chancery, for an account. But the present is a different case. The alleged agency was for a single transaction, in which no such accounts as we have mentioned could arise; and the remedy for a breach is exclusively at law." Blackford, J., in Coquilard v. Suydam, 8 Blackf. (Ind.) 24, 30.

purchaser cannot sue for and recover it back. The facts in this case show that the purchasers paid the money to the plaintiffs, not to the plaintiffs personally, but to the defendant [illegible] plaintiffs authorized to receive it. When the money was paid it became the plaintiffs' money, and which it was received by the defendant as such agent the law, in consideration thereof, [illegible] promise on the part of the defendant to pay it over to his principal the plaintiffs; it is this obligation that the present action is brought to enforce; no illegality attaches to the contract. But the defendant insists that, inasmuch as the principal could not have enforced the contracts of sale, as between himself and the purchaser, therefore as the purchaser has performed the contracts by paying the money to the plaintiffs through me, as their agent, I can now set up the illegality of the contract of sale to resist an action brought to enforce a contract on my part to pay the money that I as agent received over to my principal. In other words because my principal did not receive the money on a legal contract, I am at liberty to steal the money appropriate it to my own use, and set my principal at defiance. We think the law is not settled otherwise, and the fact that the defendant acted [illegible] in obtaining orders for the goods [illegible] Bryant v. Elliot, 1 B. & P. 2; Armstrong v. [illegible] Evans v. City of Trenton, 4 Zab. (N. J.) 764. [illegible] granted by the county court was properly granted. If [illegible] on behalf of the defendant that the seal with which he has executed this case shows that he intended no wrong; but we think the man who receives money in a fiduciary capacity, and refuses to pay it over, does not improve his condition by the tenacity with which he holds on to it.

Judgment of the county court affirmed.[1]

HAAS v. DAMON

1850. Supreme Court of Iowa. 9 Iowa 589.

Stockton, J.—The plaintiff claims of defendant five hundred dollars for the price and value of three certificates of stock, or shares

[1] Regarding the duty of the agent to keep book accounts see Chicago Life and Trust Co. v. Ward, 113 Ill. 242.

An agent is liable to account only to his principal. Attorney General v. Chesterfield, 18 Beav. 596.

In mercantile agencies (as perhaps others, where the nature of the business requires the agent to keep regular accounts of purchases and sales, or of receipts and expenditures, with his principal, he may be called upon by the principal at chancery, for an account. But the present is a different case. The alleged agency was for a single transaction, in which no such account as we have mentioned could arise; and the remedy for a breach of confidence is at law." Blackford, J., in Crosthwait v. Sanders, 3 Blackf. (Ind.) 21, 29.

in the town of Cincinnati, Harrison county, Iowa, delivered by him to defendant to sell and dispose of for the best interest of plaintiff, upon the agreement of defendant to sell the same to the best possible advantage, and account to plaintiff for the proceeds thereof. And plaintiff avers that defendant refuses to deliver to him said certificates, and refuses to account for the proceeds of the sale of the same though requested so to do.

The defendant answers denying the allegations of the petition, and averring that at the time of receiving said certificates, the plaintiff directed him to exchange them for anything he could get for the same; and that under such instruction he did exchange them for one gold watch, two silver watches and twenty dollars in money, which he immediately thereafter offered to deliver to plaintiff, who refused to receive the same; that defendant has been at all times and still is ready and willing to deliver up said property to plaintiff, on his paying defendant a reasonable compensation for his trouble and services. The plaintiff replied to the answer denying that he authorized defendant to exchange said certificates as alleged by defendant, and denying that defendant had made any tender to plaintiff as alleged. On the trial, which was by the court instead of a jury, the plaintiff gave in evidence the following receipt:

"COUNCIL BLUFFS, March 4, 1857.

Received of A. Haas, three shares in Cincinnati, Harrison county, Iowa, to sell for him on commission. J. W. DAMON."

And proved that defendant had sold the shares a few weeks after receiving the same, to one Gardner, for half-share in Elk Horn, Nebraska. After proving the value of shares in Elk Horn, plaintiff rested his cause. The court on motion of defendant nonsuited the plaintiff for the reason that no demand to defendant to return the certificates, or account for the same had been shown, before suit was brought.

We think the district court was not justified under the evidence given, in rendering judgment of nonsuit gainst the plaintiff. The duty of the defendant, by his written undertaking, was to sell the shares for the plaintiff. The authority to sell, did not authorize him to exchange them for other property. When the plaintiff, therefore, had shown that defendant had exchanged the shares for other property, instead of selling them, he so far established a conversion by defendant, that he was excused from any proof of demand before bringing suit. Story on Agency, § 78. Cutter v. Fanning, 2 Iowa 580.

It was the duty of defendant to render an account to plaintiff in due season, and in reasonable time after selling the shares, and in case of neglect, or refusal so to do, he is probably liable to an action without any demand, as soon as he is in default, for not accounting. Torry v. Bryant, 16 Pick. 528; Schee v. Hassinger, 2 Bin. 325.

When, however, he has rendered his account duly, and is in no default of any kind, he is not liable to an action for money received by him, until a demand has been made upon him, or until he is directed to make remittance. Ferris v. Parris, 10 John. 285; Cooley v. Betts, 24 Wend. 203.

One of the issues made by defendant was, that at the time of receiving the shares, plaintiff directed him to exchange them for anything he could get for them. As the undertaking of defendant was in writing, and was to sell on commission, it might be doubtful how far he could be allowed to enlarge his authority by parol evidence applicable to the same subject-matter at the same point of time, and which might in effect contradict, vary or control what must be understood as the agreement of the parties as derived from the writing. Story on Agency, §§ 79, 80.

As the question does not arise, we indicate no opinion. The judgment will be reversed for the error of the district court in directing the nonsuit.

Judgment reversed.

Section 5.—Duty of Gratuitous Agent.

HAMMOND *v.* HUSSEY.

1871. Supreme Judicial Court of New Hampshire. 51 N. H. 40.

Foster, J.—The substance of the plaintiff's declaration is that the school committee employed the defendant to examine candidates for admission to the high school, and to report upon their qualification; that the defendant voluntarily undertook to make such examination; that he examined the plaintiff, and found him to possess the requisite qualifications; but, with intent wrongfully to exclude the plaintiff from the school and to deprive him of its benefits, maliciously and falsely reported to the committee that he was not qualified; and, by reason of this malicious and false representation, the plaintiff was excluded from the school and lost its benefits.

The declaration, therefore, charges upon the defendant a wilful and positive deceit and fraud; and the suit is placed upon the general ground that, where one party sustains an injury by the malfeasance of another, the sufferer may maintain an action against the wrongdoer for redress.

The defendant contends that upon this declaration no suit can be maintained; because, assuming the allegations to be true, there is no contract, express or implied, between these parties, and without privity of contract there can be no liability.

When, however, he has rendered his account and paid to the defendant any balance he is not liable to an action for money received by him, until a demand has been made upon him, and he is directed to make remittance. Perris v. Perris, 10 John. 236; Cooley v. Betts, 2 Wash. 205.

One of the notes made by defendant was due at the time of receiving the checks, plaintiff directed him to exchange them for something he could get cash for. As the ascertaining of defendant's duty in striking out the item of commissions, it might be essential how far he could be allowed to enlarge his authority by parol evidence applicable to the same subject-matter at the same point of time, and which might so affect, contradict, vary or control what must be understood as the agreement of the parties as derived from the writing. Allen on Agency, §§ 70, 80.

As the pleadings now stand, we intimate no opinion. The judgment will be reversed for the error of the district court in directing the nonsuit.

Judgment reversed.

Section 3.—Equity Jurisdiction Upheld.

[illegible] v. [illegible], Comm'r of Wyo. Territory, et al., 11 N. H. 40.

Bennett, J. The substance of the plaintiff's declaration is that the school committee appointed the defendant to examine candidates for admission to the high school, and to report upon their qualifications, that the defendant accordingly undertook to make such examination, right to examine the plaintiff, and refused him to possess the requisite qualifications; but that said defendant wrongfully to exclude the plaintiff from the school and to deprive him of its benefits maliciously and falsely reported to the committee that he was not qualified; and, by reason of the malicious and false representation, the plaintiff was excluded from the school and lost its benefits.

The declaration, therefore, charges upon the defendant a wilful and positive deceit and fraud; and the suit is placed upon the general ground that, whenever any person sustains an injury by the misfeasance of another, the sufferer may maintain an action against the wrongdoer for redress.

The prevailing counsel that upon this declaration no suit can be maintained; because, assuming the allegations to be true, there is no contract, express or implied, between these parties and without privity of contract there can be no liability.

It is true that there was no express contract between the parties, and that the defendant acted in the performance of no public duty nor of any obligation to the plaintiff. It is also true that the plaintiff was under no obligation to submit himself to the defendant for examination.

But the plaintiff contends that notwithstanding the acts of both parties were voluntary, still the undertaking of the defendant to examine the plaintiff, and the plaintiff's submission of himself to that examination, created and established between them a contract, by implication of law, and that, such being the case, the defendant was under obligation, notwithstanding his work was gratuitous, to perform his undertaking with ordinary care and diligence—to make examination of the plaintiff in good faith, and truthfully to report the result to the committee.

It may be doubted whether these considerations necessarily enter into the present inquiry. The case does not rest upon a charge of negligence nor of misfeasance at all, nor even of malfeasance in the performance of any duty imposed by law or required by the terms of a contract; but the declaration charges a positive and willful false representation, deceit and fraud, whereby the plaintiff received damage. It is of the character of a declaration in slander, and would seem to be governed by the principles applicable to such a case.

And although it may be said that the voluntary relationship which the parties assumed placed them in privity of contract, so that for negligence in the performance of the defendant's undertaking, *a fortiori,* for fraud concerning it, he would be liable, in damages, in this action, still, it may be seriously questioned whether the alleged fraud and deceit, though perhaps connected with contract by implication of law, is necessarily affected by or at all dependent upon the existence of such contract.

What difference does it make whether the defendant, in the perpetration of a malicious fraud and falsehood, such as the demurrer admits, violated an express or an implied contract, or any duty resulting from his relation either to the plaintiff or to the school committee; or, whether as a mere stranger, in law, he achieved the wrong and caused the damage? Does not the general and the simple rule apply, that, where a party sustains an injury by the willful wrong of another, the sufferer may have his action against the wrong-doer? See Mayor of Albany v. Cunliff, 2 N. Y. 180; Pasley v. Freeman, 3 Term 51, S. C., 2 Smith's Lead. Cas. 137, 138; Willink v. Vanderveer, 1 Barb. 599; Watson v. Poulson, 7 Eng. L. & Eq. 585; Salem Bank v. Gloucester Bank, 17 Mass. 1.

But without placing the decision of the question before us upon these grounds, we have no difficulty nor hesitation in disposing of them by the application of the principles so well settled in Coggs v. Bernard, 2 Ld. Raym. 909, 1 Smith's Lead. Cas. 284.

As all lawyers know, it was there held that "if a man undertakes

to carry goods safely and securely he is responsible for any damage they may sustain in the carriage through his neglect, though he was not a common carrier, and was to have nothing for the carriage.

The analogy is obvious, and the principle evolved, and by the application of which this case is to be determined, is that the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it. Notes to 1 Smith's Lead. Cas. 254; Wilkinson v. Coverdale, 1 Esp. N. P. Rep. 74; Doorman v. Jenkins, 2 Ad. & E. 256; 1 Parsons Contracts (5th ed.) 447, and note *w*.

By this rule a gratuitous and voluntary agent, who has no public or official duty to perform, but who, nevertheless, undertakes gratuitously to do a particular service requiring the trust and confidence of another, though the degree of his responsibility is greatly inferior to that of a hired agent, is yet bound not to be guilty of gross negligence.

Prof. Parsons expresses the rule in more broad and general terms, thus: "If a person makes a gratuitous promise, and then enters upon the performance of it, he is held to a full execution of all he has undertaken."

It is unnecessary to endorse so general a proposition without qualification or limitation; but it is sufficient to hold that if a voluntary agent, without compensation, is accountable for the consequences of his gross negligence, much more should he be held answerable for willful and malicious fraud and wrong in connection with his assumed undertaking.

Questions involving the principle under consideration seldom arise except in the case of bailments, but the principle is broad enough to include the subject of the present inquiry.

The demurrer is overruled.[1]

ISHAM v. POST.

1894. Court of Appeals of New York. 141 N. Y. 100.

Appeal from judgment of the general term of the supreme court in the second judicial department, entered upon an order made July

[1] The early leading case on the subject of gratuitous service is Coggs v. Bernard, Ld. Raym. 909. See note to that case in 1 Smith L. C. 188. See Wilkinson v. Coverdale, 1 Esp. 75.

"A short review of the leading cases will show that, by the common law, a *mandatory*, or one who undertakes to do an act for another, without reward is not answerable for omitting to do the act, and is only responsible when he attempts to do it, and does it amiss. In other words, he is responsible for a *misfeasance*, but not for a *nonfeasance*, even though special damages are averred." Kent, Ch. J., in Thorne v. Deas, 4 Johns. (N. Y.) 84, 97.

28, 1893, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at special term.

This action was brought by plaintiff, as trustee, to recover of Augustus T. Post the sum of $25,000 alleged to have been placed in his hands to be loaned for plaintiff and to be returned on demand. After the death of Post the action was revived and continued against his administratrix.

The facts, so far as material, are set forth in the opinion.

FINCH, J.—The relation between the parties to this controversy must be regarded as that of principal and agent. Post was a banker, —not a member of the stock exchange, and so bound by its rules, but familiar with its customs and usages, and controlled by them to some extent whenever dealing with stocks in the Wall street market. He held himself out to the business world in that character. By his circulars he advertised himself as dealing in "choice stocks," and promised his customers "careful attention" in all their financial transactions. Those who dealt with him contracted for, and had a right to expect, a degree of care commensurate with the importance and the risks of the business to be done, and a skill and capacity adequate to its performance. That care and skill is such as should characterize a banker operating for others in a financial center, and different in kind from the ordinary diligence and capacity of the ordinary citizen. The banker is employed exactly for that reason. Without it there might cease to be motives for employing him at all.

Isham was the trustee of an express trust, but in this dispute must be regarded simply as an individual, and without reference to his trust character; for the trial court has found as a fact that, in employing the banker to loan for him $25,000, he gave no notice of the trust character attaching to the money, contracted apparently for himself, and left Post to believe, and be justified in believing, that the money was his own. The evidence on the subject admits of some difference of opinion, but on this appeal the finding must control.

In the same way the question whether Post's services in making the loan were or were not to be gratuitous must be deemed settled. The finding is that those services were to be without compensation; and on that ground the appellant claims that Post was a gratuitous mandatary, and liable only for gross negligence. But, while no compenstion as such was to be paid, it does not follow that the banker was freed from the obligation of such diligence as he had promised to those who dealt with him, or was at liberty to withhold from his agency the exercise of the skill and knowledge which he held himself out to possess. Nothing in general is more unsatisfactory than attempts to define and formulate the different degrees of negligence; but even where the neglect which charges the mandatory is described as "gross," it is still true that if his situation or employment implies ordinary skill or knowledge adequate to the undertaking, he will

be responsible for any losses or injuries resulting from the want of the exercise of such skill or knowledge. Story on Bailments, § 182a; Shiells v. Blackburne, 1 H. Black. 158; Foster v. Essex Bank, 17 Mass. 479; First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 295. In the latter case it was said that ordinary care as well as gross negligence, the one being in contrast with the other, must be graded by the nature and value of the property, and the risks to which it is exposed. Post, therefore, was required to exercise the skill and knowledge of a banker engaged in loaning money for himself and for his customers, because of the peculiar character and scope of his agency, because of his promise of careful attention, and because the contract was made in reliance upon his business character and skill.

We should next consider upon whom rested the burden of proof. The plaintiff alleged and proved that he put into Post's hands, as his banker and agent, to be loaned upon demand at the high rates of interest prevailing, and in the mode approved by custom and usage, the sum of $25,000, which sum Post had not returned, but refused to return upon proper demand, and so had converted the same to his own use. That made out plaintiff's case. Judgment for him must necessarily follow, unless Post, in answer, has established an affirmative defense. That which he pleaded and sought to prove was that the money was lost without his fault and through an event for which he was altogether blameless. In other words, he was bound to show that he did his duty fully and faithfully, and without negligence or misconduct, so that the resultant loss was not his, but must justly fall upon the plaintiff. Marvin v. Brooks, 94 N. Y. 75; Ouderkirk v. C. N. Bank, 119 *id.* 267. With that burden resting upon him, we must examine his defense and the evidence given in its support, and determine whether or not it is our duty to sustain the adverse conclusion, to reverse which he brings this appeal.[1] * * *

Judgment reversed.

BEARDSLEE v. RICHARDSON.

1833. Supreme Court of New York. 11 Wend. 25.

This was an action on the case, tried at the Onondaga circuit in March, 1832, before the Hon. Daniel Moseley, one of the circuit judges.

The declaration contains several special counts; in the one principally relied on, it is stated that the plaintiff delivered to the defendant a bank note for $100, the property of the plaintiff, which the defendant undertook and promised to take care of, and safely carry from New Orleans to the town of Salina in this state, and there deliver the

[1] The court here considered the question whether Post was in fact negligent.

be responsible for any losses or injuries resulting from the want of the exercise of such skill or knowledge. Story on Bailments, § 182; Shiells v. Blackburne, 1 H. Black. 158; Foster v. Essex Bank, 17 Mass. 479; First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278. In the latter case it was said that ordinary care in such a case regarding the one being in contract with the other must be tested by the nature and value of the property, and the risks to which it was exposed. Post, therefore, was required to exercise the skill and knowledge of a banker engaged in loaning money for himself and for his customers, because of the peculiar character and scope of his agency, because of his presence of mind and attention, and because the contract was made in reference to such business character and skill.

We should next consider upon whom rested the burden of proof. The plaintiff alleged and proved that he put into Post's hands as his banker and agent, to be loaned upon demand at the high rates of interest prevailing [illegible] the money approved by custom and usage, the sum of [illegible] which Post had not returned, but retained to himself the proceeds thereof, and so had converted the same to his own use. [illegible] plaintiff's case. Judgment for him must necessarily [illegible] Post, in answer, has established an affirmative defense. [illegible] is pleaded and sought to prove was that on receiving [illegible] without his fault and through an event for which [illegible] liableness. In other words, he was bound to exercise only [illegible] and without negligence or misconduct, as that the peculiar [illegible] him, but must justly fall upon the plaintiff. Harris v. Rhodes, 64 N. Y. 75; Cuderkirk v. C. N. Bank, 70 id. 105. With this burden resting upon him, we may examine the evidence and the evidence given in its support, and determine whether or not it is our duty to sustain the adverse conclusion of referee which he adopted this appeal. [illegible]

Judgment reversed.[1]

PEARSON v. RICHARDSON.

1833. Supreme Court of New York. 10 Wend. 256.

This was an action on the case, tried at the Onondaga Circuit in March, 1832, before the Hon. Daniel Moseley, one of the circuit judges.

The declaration contained several special counts; to the last principally relied on, it is stated that the plaintiff delivered to the defendant a bank note for $100, the property of the plaintiff, which the defendant undertook and promised to take care of, and safely carry from New Orleans to the town of Salina in this state, and there deliver the

[1] The court here considered the previous question. Post was in fact negligent

same to the plaintiff in a reasonable time then next following; it is then averred, that although a reasonable time had elapsed, etc., the defendant did not and would not, although often requested, etc., safely and securely carry the bank note from New Orleans to Salina, but wholly neglected and refused so to do. The declaration also contains the common money counts. On the trial, the plaintiff produced the deposition of William Beardslee, taken at New Orleans, who stated that in the spring of 1829, at New Orleans, he delivered to the defendant a sealed letter addressed to the plaintiff, James Beardslee, at Salina in this state, containing a United States bank bill for $100, and informed the defendant of the contents of the letter, and that the bill belonged to the plaintiff; and that the defendant promised to deliver the letter to the plaintiff as soon as he arrived at Salina, stating that he was going to Auburn, and would proceed to Salina and deliver the letter to the plaintiff. It was further proved, that about the 1st of May, 1829, the defendant was at Auburn, and that this suit was commenced in May, 1830. The judge refused to nonsuit the plaintiff, and charged the jury that although the plaintiff was not entitled to recover on the special counts of his declaration, yet he would submit to them whether he was not entitled to recovery on the money counts. He remarked that the plaintiff having shown the placing of the letter containing the bank note in the hands of the defendant, his promise to deliver it, his arrival at Auburn, and the lapse of a year thereafter previous to the commencement of this suit; it was left to them to say whether a demand might not be presumed, if a demand was necessary. And he further instructed the jury, that although the defendant was a bailee without hire, yet the facts shown seem to impose upon him the necessity of making some proof accounting for the letter and bank note. The jury found a verdict for the plaintiff for $114. The defendant moves for a new trial.

By the Court, Savage, Ch. J.—If the defendant was liable upon the money counts, he was not liable as bailee, but as having received the money of the plaintiff for his use. The evidence does not prove that fact, nor does it show that he received it otherwise than in a sealed letter. It cannot be said to be money in the defendant's hands; unless he broke the seal, it could not answer the purposes of money, and there is no evidence of such act.

It was a sealed package of the value of one hundred dollars, which the defendant, as bailee, without reward, undertook to deliver. It was held at the circuit, and, I think, correctly, that the plaintiff could not recover upon his special counts, which charged the defendant as bailee. The defendant was liable for gross neglect only; and whether he was guilty of any neglect, does not sufficiently appear from the testimony. It does not appear that any demand was made, or application of any kind, until the suit was brought. The plaintiff was bound to show that the money was lost by the defendant's neg-

ligence, or could not be obtained on request. Had he shown a demand and refusal, the defendant, I think, would have been bound to account for the loss, and to indemnify the plaintiff, unless he could show the property lost without fault on his part, that is, without gross negligence.

New trial granted, costs to abide event.[1]

VICKERY v. LANIER.

1858. Court of Appeals of Kentucky. 1 Met. 133.

The facts appear in the opinion.

Stites, J.—No doubt exists as to the principles of law applicable to this case. If the appellees, or either of them, undertook for a consideration to insure the goods which were lost, and failed and neglected to comply with such undertaking, a liability at once attached for any damage resulting from such failure.

Or, if such undertaking were merely gratuitous, and they proceeded to execute it, and then abandoned or neglected its performance, a like liability accrued.

In the one case the claim for damage would grow out of a breach

[1] In Doorman v. Jenkins, 2 A. & E. 256, it was held that a gratuitous bailee is liable only when guilty of gross negligence. On page 261 Taunton, J., said: "The phrase 'gross negligence' means nothing more than a great and aggravated degree of negligence, as distinguished from negligence of a lower degree."

"To define what constitutes 'gross negligence' so as to render the phrase more intelligible or exact, is difficult if not impossible; and all attempts to do so have, it would seem, heretofore failed. We are disposed to regard it as a question of fact, to be determined by reference to all the circumstances of the case, including the subject-matter and objects of the agency, and the known character, qualifications, and relations of the parties. What would be but slight negligence in the treatment of a matter of trifling importance, might perhaps be gross negligence in dealing with concerns of momentous interest. And a stupid or ignorant man, while devoting all his powers to the duties of his agency, might be guilty of blunders of omission or commission which, in one of higher qualifications, would be strong or conclusive evidence of culpable delinquency." Brinkerhoff, J., in Grant v. Ludlow's Adm'r, 8 Ohio St. 1, 10.

"No one taking upon himself a duty for another without consideration is bound, either in law or morals, to do more than a man of that character would do generally for himself under like conditions. The exercise of reasonable care is in all such cases the dictate of good faith. * * * The general doctrine, as stated by text-writers and in judicial decisions, is that the gratuitous bailees of another's property are not responsible for its loss unless guilty of gross negligence in its keeping. But gross negligence in such cases is nothing more than a failure to bestow the care which the property in its situation demands; the omission of the reasonable care required is the negligence which creates the liability; and whether this existed is a question of fact for the jury to determine." Field, J., in Preston v. Prather, 137 U. S. 604, 608.

[illegible] could not be obtained on request. [illegible] a demand and refusal, the defendants, a third person [illegible] bound to account for the loss, and to indemnify the plaintiff [illegible] could [illegible] the property [illegible] on his own account without [illegible] notice or assent.

New trial granted, costs to abide event.

VICKERS v. LANIER

1858. Court of Appeals of Kentucky. 1 Met. 151.

THE facts appear in the opinion.

STITES, J. [after stating the facts and referring to the principles of law applicable to the case]: If the appellee, or either of them, undertook for a consideration to insure the goods which were lost, and failed and neglected to comply with such undertaking, a liability at once attached for an [illegible] resulting from such failure.

Or, if such undertakings were merely gratuitous, and they proceeded [illegible] and thus discontinued or neglected or performance [illegible]

To [illegible] claim for damages would grow out of a breach

[illegible] in Newman v. Cazalet, [illegible] it was held that a gratuitous bailee is liable only [illegible] gross negligence. On page 261 Lawrence, J., said: "The [illegible] gross negligence [illegible] from a great and unreasonable degree of negligence [illegible] from inadvertency or a lower degree."

To define what constitutes gross negligence is to [illegible] the phrase more intelligible or easier to [illegible]. It has [illegible] and [illegible] to be an [illegible] a want of [illegible] which [illegible] discovered by [illegible] a question of fact to be determined by reference to all the circumstances of the case, including the [illegible] and degree of the agency and the known character [illegible] the parties. What would be [illegible] negligence in the management of a matter of trifling importance might [illegible] gross negligence in dealing with concerns of momentous interest, and a careful or [illegible] man would [illegible] all his powers to the duties of his agency [illegible] the [illegible] of [illegible] or [illegible] which, in one of [illegible] [illegible] [illegible]

of contract, and in the other out of the misfeasance of the party. But to create such liability, however, there must have been an undertaking. The parties should have intended to enter into the agreement.

The question here is, was there sufficient evidence of an undertaking on the part of Lanier to effect an insurance, to have authorized a verdict in behalf of appellants, or, in other words, to have upheld such a finding?

About the general facts of the case there is no controversy. It is conceded that Lanier & Co., were grocery and commission merchants in Nashville; but that, prior to this transaction, there had been no dealings between the parties; that the goods were shipped from New Orleans to their care at Nashville, to be re-shipped from the latter point to Stigell's Landing, in Pulaski county, Kentucky; that appellants had no funds in the hands of Lanier & Co., to pay for insurance, and that no arrangement had been made for that purpose, nor any for their reimbursement in case of insurance. The undertaking to forward the goods was made at New Orleans some days before the alleged undertaking to insure. The answer admits the undertaking to forward, but emphatically denies any promise or undertaking, implied or express, to insure; admits also, that word was sent to insure, and that an effort was thereafter made to that effect, but denies that they promised to obtain insurance, or that there had been any previous dealing between the parties from which any promise or agreement to insure could have been or was implied.

Jones, the witness, and the only one who is introduced to prove the direct undertaking or promise, says, in substance, that after L. A. Lanier had started to Nashville, Vickery requested him (the witness) to tell Lanier at Nashville to have the goods insured; that, according to request, he went to the counting-room of Lanier & Co., saw Lanier alone, and informed him of the request of Vickery in this language: "Vickery wants his things or goods insured," and that "Lanier gave me to understand, as I thought, that it would be done." Nothing was offered Lanier to pay for insurance, nor were there any contract to insure. Nothing was said about paying for insurance. He could not say that Lanier did or said anything when he told him to have the things insured, but it was his understanding "that it would be done." Upon his return to Pulaski he was told by Lanier that he had tried to insure Vickery's goods, but could not get it done.

McKee proved that Lanier told him no effort had been made to insure, because no funds had been left to pay for it. And Gordon, that it was not the custom or duty of commission merchants in Nashville to insure goods forwarded to them.

This was substantially all the evidence as to the alleged promise or undertaking. And we have no hesitation in saying it was wholly insufficient to establish such promise, or to uphold a verdict to that effect.

The utmost it proves is a request to insure, and the impression or understanding of the witness that "it would be done," without, as he says, any word or act upon which to found such understanding.

A simple request to insure, where no funds are provided, or where there has been no previous dealing between the parties or no goods on consignment from which the party requested may reimburse himself, will not, of itself, devolve upon him the duty to insure, or render him liable for failing so to do. Neither will his subsequent effort to comply with such request have that effect. There must have been an undertaking or promise to insure, made at the time, and intended as such by the parties. The party making the request must have had some assurance on which he had the right to rely, and from which he had the right to expect the other party would insure, or, in other words, there must in the language of all the books have been an undertaking to that effect. Without it no liability attaches.

Such promise or undertaking is implied where the course of dealing has been such that the agent has been used to effect insurances, or where he has funds or effects on hand, or even where the bill of lading from which he derives his authority contains an order to insure, or where the general usage is to insure, and in such case he is bound at his peril to insure. But in the absence of these circumstances, as in this case, no such obligation rests upon him. And he is not bound for any loss arising from a failure to insure, unless he has undertaken so to do. (Story's Agency, 238; Paley on Principal and Agent 19; Story on Bailments 165.)

Our opinion, therefore, is, that the court below properly instructed the jury to find for appellees, and the judgment must be affirmed.[1]

McNEVINS v. LOWE.

1866. Supreme Court of Illinois. 40 Ill. 209.

Lawrence, J.—This was an action brought against the appellant for malpractice as a surgeon and physician. In the third and fourth instructions for the plaintiff, the court told the jury that the defendant, if he held himself out as a physician, was liable for whatever damage may have accrued to the plaintiff by reason of *any* want of care or skill on his part whether he charged fees or not. This states the responsibility of a physician too strongly, as it requires the highest degree of care and skill, whereas only reasonable care and skill are necessary. As to the payment of fees the instruction is unob-

[1] The principal, upon learning that the agent has failed to insure, should effect the insurance himself. If he fails to do so, he cannot recover from the agent for a resulting loss. Brant v. Gallup, 111 Ill. 487.

[illegible] proved a request to insure [illegible] or understanding of the witness that "it would be [illegible] without, as he says, any word or act upon which to found such understanding.

A simple request to insure, where no [illegible] or where there has been no previous dealing between the [illegible] goods or consignment from which the party requested may [illegible] himself, will not, in itself, operate upon him the duty to insure, [illegible] him liable for failing so to do. Neither will his subsequent acts to comply with such request [illegible] effect. There must have been an undertaking or promise to [illegible] made at the time and intended as such by the parties. The party making the request must have had some assurance on which [illegible] the right to rely, and from which he had the right to expect [illegible] other party would insure, or, in other words, there must in the language of all the books have been an undertaking to that effect. Without it no liability attaches.

Such promise or undertaking is implied where the course of dealing has been such that the agent has been used to effect insurances, or where in his [illegible] or [illegible] on hand, or even where the bill of lading [illegible] which he knows his authority contains an order to insure, or states the general usage is to insure, and in such case he is bound to [illegible]. But in the absence of these circumstances [illegible] such obligation rests upon him. And he [illegible] arising from a failure to insure, unless he [illegible] (Story's Agency, 238; Paley on Principal and Agent, [illegible] Sargent, 167.)

Our opinion, therefore, is that the court below properly instructed the jury to find for [illegible] and the judgment must be affirmed.[1]

McDANIELS v. LOWE.

1866. Supreme Court of Illinois. 40 Ill. 499.

Lawrence, J.— This was an action brought against the appellant for malpractice as a surgeon and physician. In the third and fourth instructions for the plaintiff the court told the jury that the defendant, if he held himself out as a physician, was liable for whatever damage may have accrued to the plaintiff by reason of any want of care or skill on his part whether he charged fees or not. This states the responsibility of a physician too strongly. It requires the highest degree of care and skill whereas only reasonable care and skill are necessary. Nor is the payment of fees the distinction it is made

[1] The principal upon learning that the agent has failed to insure, should elect the insurance himself. If he does so he cannot recover from the agent on a resulting loss. Bruce v. Gabriel, 17 Ill. 456.

jectionable. If a person holds himself out to the public as a physician he must be held to ordinary care and skill in every case of which he assumes the charge, whether in the particulr case he has received fees or not. But if he does not profess to be a physician nor to practice as such, and is merely asked his advice as a friend or neighbor, he does not incur any professional responsibility. The case of Ritchey v. West, 23 Ill. 385, is to be understood in this sense. The judgment must be reversed because the instruction required the highest degree of care and skill.

Judgment reversed.

WILLIAMS v. McKAY et al.

1885. Court of Errors and Appeals of New Jersey. 40 N. J. Eq. 189.

Beasley, C. J.—This bill was exhibited by the receiver of the Mechanics' and Laborers' Savings Bank against its managers, for the purpose of holding them liable for certain losses sustained by the institution from time to time through a series of years. The right to the relief prayed is based on the alleged negligence of these officers in the management of the corporate affairs.

The bill which is somewhat loosely framed contains, in substance, a statement which is mainly substantiated by details of official delinquencies in the following particulars, viz.: First, in the investment of moneys in a large number of specified instances on insufficient landed security, and in violation of the charter of the company; second, in the loaning of other moneys on mere personal security; third, in permitting the president of the bank, one John Halliard, to withdraw, without giving adequate security; and to apply to his own use, the funds of the bank; and fourth, in the failure to require the president to give bond for the faithful performance of his official duties.

The question before this court is whether the decree appealed from is to be sustained, which holds that these charges, as stated in the bill, do not lay any ground of equity in the complainant.

Viewed in its general aspect, the equitable rule which is applicable to persons holding official positions, such as were held by these defendants, is not in doubt. The duty belonging to such a situation is a plain one—to care for the moneys intrusted to them in the manner provided in the charter, and to exercise ordinary care and prudence in so doing. It is true that the defendants were unpaid servants, but the duty of bringing to their office ordinary skill and vigilance was none the less on that account, for to this extent there

is no distinction known to the law between a volunteer and a salaried agent. These defendants held themselves out to the public as the managers of this bank, and by so doing they severally engaged to carry it on in the same way that men of common prudence and skill conduct a similar business for themselves. This is the measure of the responsibility of officers of this kind.[1]

Decree unanimously reversed.

[1] See collection of cases on liability of bank directors in 5 Cyc. 480-482.

A leading case on the subject of the liability of bank directors is Hun v. Cary, 82 N. Y. 65. On page 74 of that case Earl, J., said: "One who voluntarily takes the position of director, and invites confidence in that relation, undertakes, like a mandatory, with those whom he represents or for whom he acts, that he possesses at least ordinary knowledge and skill, and that he will bring them to bear in the discharge of his duties. Such is the rule applicable to public officers, to professional men and to mechanics, and such is the rule which must be applicable to every person who undertakes to act for another in a situation or employment requiring skill and knowledge; and it matters not that the service is to be rendered gratuitously."

See Morawetz, Private Corporations, § 552.

CHAPTER XIII

CONSTRUCTION OF CONTRACTS

Section 1.—As to Terms of the Agreement.

CHAPTER XIII.

TERMINATION OF AGENCY.

Section 1.—By the Terms of the Agreement.

GUNDLACH ET AL. V. FISCHER ET AL.

1871. SUPREME COURT OF ILLINOIS. 59 Ill. 172.

ACTION by Gundlach and another against Fischer and others on a bond given by Fischer as principal and the others as sureties, for the faithful performance by Fischer, of his duties as agent, for the plaintiffs, for the sale of certain machines. The suit was for an alleged failure of Fischer to account for and pay over to the plaintiff certain moneys received by him from the sale of machines, as required by the terms of the agreement. The bond was given to secure the performance of Fischer's agreement, which was as follows:

Article of agreement, made and entered into, by and between Gundlach & Esler, of Belleville, St. Clair county, and state of Illinois, and George Fischer, of Trenton, county of Clinton, state of Illinois, in manner and form following, to wit:

The said George Fischer agrees to act as agent for said Gundlach & Esler, for the sale of the Buckeye reaper and mower, and horse hay rakes, and Gundlach's patent grain drill, manufactured by Gundlach & Esler, Belleville, Illinois.

The said agency shall extend over and in the vicinity of Trenton, county of Clinton, state of Illinois, in conformity with the terms and stipulations hereinafter expressed; and the said Gundlach & Esler in consideration of the faithful performance by the said G. Fischer of the obligations by him hereinafter assumed, agree to furnish the said G. Fischer such number of machines as the said G. Fischer may be able to sell as their agent, prior to October 1st, 1867; the said Gundlach & Esler reserving to themselves the right, in case they shall not be able to fill his orders, to restrict him to such number of machines as they may be able to supply.

The said G. Fischer further agrees, in acting as such agent:

First. To sell no other machines or rakes but such as are fur-

nished by Gundlach & Esler; and in making sales, to be governed by the instructions hereto annexed, and such as may be given by Gundlach & Esler from time to time, either in writing or print, and made part of this contract; and in no case to sell a machine, or any part thereof, to any person or persons not known by him to be perfectly good and responsible.

Second. To receive and take good care of all machines sent to him as such agent; to have them properly stored; to pay all freight and charges thereon; to do any and all business connected with the same, and putting them in successful operation. And should any machines remain unsold at the end of the season, to hold the same subject to the order of Gundlach & Esler, and deliver the same in as good order as when received, when required, to them or their authorized agent, free from any and all charges whatsoever, except for money advanced for freight.

Third. To attend to selling said machines and collecting and remitting all moneys to Gundlach & Esler promptly and at the time of each sale.

Fourth. To attend to collecting of, or to the obtaining of further security on or to the renewal of such notes as are not paid promptly at maturity. For performing the services herein enumerated the said Gundlach & Esler agree to pay the said Fischer ten dollars on each reaper sold, two dollars on each rake, and eight dollars for each drill, all sold and settled for as above, the same to be payable at the time and in the same proportion as the payments are made on the machines sold; the foregoing sum to include the compensation for receiving, storing, delivering, selling, collecting, remitting and putting the machines in practical operation.

In testimony whereof the parties hereunto set their hands and seals this 3d day of May, 1867.

DUNDLACH & ESLER. (L. S.)
GEORGE FISCHER. (L. S.)[1]

PER CURIAM.—A fair and reasonable construction of the agreement makes Fischer the agent of Gundlach & Esler, for the sale of machines, until the first of October, 1867. And the appellees, by their obligation, undertook for the faithful discharge of all of Fischer's duties as such agent, and that he should account for and pay all moneys, notes, etc., to Gundlach & Esler, for property and for machinery received prior to that date. It appears, from the evidence, that he received machinery prior to the first day of October, 1867, amounting to $2,023.92. For his faithful account of that sum his sureties are liable, but they are not for machines or property received after that date. The agreement only contemplated that he should act as agent up to that time, and, hence, the sureties only bound them-

[1] A portion of the agreement is omitted.

[illegible] by Gundlach & Esler, and in making [illegible] to be governed by the instructions hereto annexed, the same to [illegible] given by Gundlach & Esler from time to time, either in writing or [illegible], and made part of this contract; and in no case to sell a machine or any part thereof, to any person or persons not [illegible] perfectly good and responsible.

Second. To receive and take good care of all machines sent to [illegible] as such agent; to have them properly stored [illegible] and charges thereof, [illegible] and all business connected with the same, and putting them in successful operation. And should any machine remain unsold at the end of the season, to hold the same subject to the order of Gundlach & Esler, and deliver the same in as good order as when received, when required, to them or their authorized agent, free from [illegible] and all charges whatsoever, except for money advanced for freight.

Third. To attend to setting said machines and collecting and remitting all moneys to Gundlach & Esler promptly and at the time of each sale.

Fourth. To attend to the [illegible] of or to the obtaining of further security [illegible] of such notes as are not paid promptly at maturity. For the performance of the services herein enumerated the said Gundlach & Esler agree to pay the said Fischer ten dollars on each machine sold and collected on, each paid, and eight dollars for each drill, all sold and settled for as above, the same to be payable at the time and in the manner specified, as the payments are made on the machines sold; the commissions aforesaid to include the compensation for receiving, storing, delivering, selling, collecting, remitting and putting the machines in proper operation.

In testimony whereof the parties hereunto set their hands and seals this 30 day of May, 1867.

GUNDLACH & ESLER. [L. S.]
GEORGE FISCHER. [L. S.]

PER CURIAM.—[illegible] the proper construction of the agreement makes it either the agent of Gundlach & Esler for the sale of machines, until the first of October, 1867. And the appellees, by their obligation, undertook for the faithful discharge of all of Fischer's duties as such agent, and thus he should account for and pay all moneys, notes, etc., to Gundlach & Esler, for property and for machines received prior to that date. It appears, from the evidence, that he received machines prior to the first day of October, 1867, amounting to $2,023.92. For his faithful account of and for the sureties are liable, but they are not for machines or money received after that date. The agreement only contemplated that he should act as agent up to that time, and, hence, the sureties could [illegible]

A portion of the agreement is omitted.

selves that he should account for machinery received before that date.

The evidence, however, fails to show that Fischer has accounted for all the money and notes received on the sale of the machinery received before the first of October, 1867. Even by Fischer's evidence, it appears that there is some amount still due Gundlach & Esler, for machinery received within the period for which the sureties were bound, and for whatever sum that may be so due they are liable and the jury should have found that amount, by their verdict. Fischer does not pretend that he had paid the full amount received for the sale of machinery so furnished him, and appellants' witnesses make the amount over two hundred dollars, after deducting the note sent him for collection after the first of October, and all payments. But allowing him a credit of all he claims, still he would owe them, for which his sureties would be liable, at least $87 and interest. The evidence, as given in this transcript, shows at least that amount. We are clearly of opinion, that the jury misunderstood the evidence and erred in the finding of the verdict, and the court below should have granted a new trial. The judgment of the court below is reversed and the cause remanded.[2]

MOORE v. STONE ET AL.

1875. SUPREME COURT OF IOWA. 40 Iowa 259.

THE plaintiff brought this action to recover the east half of the southeast quarter of section 32, in township 69, north of range 35 west. There was a jury trial resulting in a verdict for the plaintiff.

On motion of the defendants, a new trial was granted upon the conditions that they should pay all the accrued costs, file an equitable cross-demand asking to redeem the land in controversy, and to cancel the treasurer's tax deed to plaintiff, and pay into court for the use of the plaintiff a sum equal to the whole amount of the taxes, interest, costs and penalty included in said tax deed, and the cause to remain upon the equity docket.

Under this order the defendants filed an answer, denying the allegations of plaintiff's petition, alleging that Stone is the absolute owner of the premises; that he acquired the same by purchase from his co-defendant, Scarlett, in 1870; that in the summer of 1868, Scarlett employed plaintiff to purchase the lands in controversy for him; that plaintiff did purchase the lands for him, as his agent, from one Stewart, and received a warranty deed therefor; that before the completion of said purchase, and while the plaintiff was

[2] See Danby v. Coutts, L. R. 29 Ch. D. 500.
Compare Sines v. Superintendents of Wayne Co., 58 Mich. 503.

acting as the agent of Scarlett, the plaintiff fraudulently purchased the land for "back taxes," about the 12th of October, 1868, receiving a certificate of purchase from the treasurer, and fraudulently concealed such purchase from said defendant, Scarlett; that defendant, Scarlett, depended and relied upon plaintiff that said land so purchased should be clear of incumbrances, and that plaintiff so represented to said Scarlett that the land was all right, when in fact plaintiff was concealing a tax certificate on the land. The money ordered by the court to be paid into court for the use of the plaintiff was so paid. The answer prayed for a cancellation of the tax deed, and for general relief.

The cause was tried to the court, and a decree rendered for defendants. Plaintiff appeals.

MILLER, Ch. J.—The evidence establishes the following state of facts: In the month of June, 1868, Mr. Scarlett applied to the plaintiff, who was then a member of the banking firm of Moore & McIntire, for the purpose of buying the land in controversy, if they had the agency. On being informed by plaintiff that they were not agents for the land, Scarlett said that Horace Everett, of Council Bluffs, was agent for the owner of the land. Plaintiff then examined and found the land in a printed list of lands for sale by Mr. Everett. Mr. Scarlett desired the plaintiff to buy the land for him at five dollars per acre. The plaintiff said he was going to Council Bluffs in a short time, and would see Mr. Everett and try and make the purchase. In a few days after this the plaintiff did see Mr. Everett, and bargained for the land as Scarlett desired him to do. About two weeks after this, Scarlett again called at the banking house of Moore & McIntire, did not find Moore in, but McIntire was there, and informed him that they had obtained the land for him. In a few days thereafter Scarlett called again and paid one-half the purchase money for the land, and received a written contract for a deed upon the payment of the balance. Scarlett then inquired of plaintiff how much he charged for his services? "He said, usually $20, but in this case $10 would do," and Scarlett then paid the same.

The plaintiff resided in Page county where the business was transacted, Scarlet resided, and the land was situated, in Taylor county. Sometime in the month of July, 1869, a Mr. Farrell called at the banking house of Moore & McIntire, and inquired if the deed to Scarlett for the land in controversy had been received by Moore & McIntire. He was told by them that it had not. The deed was afterwards received, being sent by Everett to Moore & McIntire's banking house, to be delivered by them to Scarlett on payment of the balance of the purchase money. On the 27th of August, 1869, Farrell again called, and plaintiff delivered the deed to him on receipt of the money due, which was remitted to Everett. In delivering the deed and receiving the last payment on the land, Moore & McIntire

both testify they were acting as agents of Mr. Everett, whom they charged the usual collection fee of one-half of one per centum.

The evidence further shows that neither plaintiff nor McIntire had any knowledge, at the time they made the purchase for Scarlett, that there were any tax liens on the land. The firm of Moore & McIntire purchased the land at tax sale in October, 1868, and held the tax certificate at the time of the delivery of the deed to Scarlett, and did not make the fact known to him. In making such tax purchase this tract was not selected and purchased by itself, but was purchased at the same time with other lands as they were offered by the treasurer, regardless of the ownership, and without any inquiry, and paying no attention to the numbers, and at the time of the delivery of the deed to Scarlett, they had no knowledge that they then held a certificate for the purchase of the land at tax sale, except what was common to all persons from the records. They then held certificates of the same kind from ten to twenty thousand acres, and their attention was not particularly called to this tract, until after the treasurer's deed came into the hands of the plaintiff.

Upon these facts it is quite clear that the agency of the plaintiff, or of Moore & McIntire, for the purchase of the land for Scarlett, terminated at the time they delivered to him the written contract for a conveyance of the land on the receipt of the one-half of the purchase money, and the payment of their fees for the services performed. When this was accomplished Moore & McIntire had done all that they, or the plaintiff, had been employed to do. They had made the purchase as Scarlett had desired them to do, delivered to him the written contract sent to them for Scarlett, received the first payment as per agreement. This completed the services they had undertaken. Scarlett himself so regarded it, for when these things were done he inquired how much they charged him for their services, and on being informed as to the amount he paid the same. They had performed the business for which the agency had been constituted, and, by operation of law, the agency was terminated. See Story on Agency, § 499, and cases cited; 2 Kent's Com. 643, and cases cited. This was in July, 1868. The purchase of the land at tax sale by Moore & McIntire was not made until October of that year. At that time they were as free to purchase the same as any other persons. Their agency no longer existed; they had not undertaken to procure a good title for Scarlett, nor to examine the title for him. The land was situated in another county from where plaintiff resided; nothing was said to them about the title, and they might well suppose that Scarlett, since he resided near the land and desired to buy it, had examined or procured some one to examine the records, in the county where the lands were situated.

It is also quite clear that the fact that the deed to Scarlett was sent by Everett to the banking house of Moore & McIntire, for the purpose of being delivered upon payment of the balance of the purchase

money, did not operate to revive the prior agency for the purchase of the land. In this transaction Moore & McIntire acted for, and as agents of the grantor in the deed. There is no evidence that Scarlett procured the plaintiff, or his firm, to obtain the deed for him. On the contrary it was sent by Everett to Moore & McIntire for the purpose of collecting the balance of the purchase money then due. They performed that service for Everett, and received their compensation from him.

It is equally clear that the plaintiff was not guilty of any fraud, in failing to disclose the fact of the tax purchase by Moore & McIntire. Their relations were not such as required such disclosure to be made, especially when it is affirmatively shown that they had no actual knowledge that they held the certificate of purchase at the time they delivered the deed to Scarlett.

The decree of the court below will be reversed, and a decree entered for plaintiff in this court if he so elects, or the cause will be remanded for a decree to be entered in conformity with this opinion by the district court.

Reversed.[1]

Section 2.—By Revocation of Authority.

PHILLIPS ET AL. v. HOWELL.

1878. SUPREME COURT OF GEORGIA. 60 Ga. 411.

JACKSON, J.—Mrs. Phillips, joining her husband in the action, sued E. P. Howell for the recovery of one thousand dollars, on the following receipt: "Atlanta, Georgia, April 17th, 1876. Received of Mrs. Mary S. Phillips, one thousand dollars for the purpose of effecting a settlement of a civil suit for damages instituted by Nancy L. Ray v. W. R. Phillips, Jr., pending in Fulton superior court—said suit to be settled during the present term of said court, if possible, and for the sum of one thousand dollars, and in the event the same is not settled for said sum, and on terms to her every way satisfactory, I am to return said one thousand dollars to said Mrs. Phillips, or her legal representative. (Signed) E. P. Howell."

Howell pleaded the general issue. The jury, under the charge of the court, found for the defendant; the plaintiff made a motion for a new trial, it was refused, and plaintiff excepted.

[1] *Accord:* Short v. Millard, 68 Ill. 292; Atlanta Savings Bank v. Spencer, 107 Ga. 629.

In Wallace v. Goold, 91 Ill. 15, an agent who was employed to secure a debt due his principal, obtained the endorsement of the debtor to several notes. It was held that his agency did not terminate while he held the notes and his acts were not approved by the principal.

money, did not operate to revive the prior agency for the purchase of the land. In this connection Vestal is estopped from denying that he was agent of the grantee in the deed. There is no evidence that Scarlett procured the plaintiff, or his firm, to obtain the loan for him. On the contrary it was sent to Everett to procure it for the purpose of collecting the balance of the purchase money due for. They presumed that it was for Vestal, and received the compensation from him.

It is equally clear that the plaintiff was not guilty of fraud in failing to disclose the fact of the purchase by Mrs. Scarlett. Their relations were not such as required such disclosure to be made, especially when it is affirmatively shown that they had actual knowledge that they held the certificate of purchase at the time they delivered the deed to Scarlett.

The decree of the court below will be reversed, and a decree entered for plaintiff as prayed for if he so elects, or the cause will be remanded for a decree to be entered in conformity with this opinion by the district court.

Reversed.

Section 2.—By Exercise of Authority.

[TITLE OF CASE] v. HOWELL

[Supreme Court of Georgia. 86 Ga. 414.]

[Action, [illegible] joining not [illegible] in the words, ever] E. P. Howell and [illegible] of one thousand dollars on the following receipt: [illegible] Georgia, April 25th, 1876. Received of Mary S. Phillips one thousand dollars for the purpose to effect the a settlement of a civil suit [illegible] instituted by Mary L. Ray vs. W. R. Phillips, [illegible] pending in Fulton superior court—said sum to be settled during the present term of said court, if possible, and for the sum of one thousand dollars, and in the event the same is not settled for said sum, then to come to her [illegible] and I do, to return said one thousand dollars to said Mrs. Phillips or her legal representative. (Signed) E. P. Howell.

Howell pleaded the general issue. The jury, under the charge of the court, found for the defendant; the plaintiff made a motion for new trial, it was refused, and plaintiff excepted.

[illegible] Shaw & Hillyer, for pl. in err. Morris Brandon, Clark & Speer, for def. in err.

[illegible] (1) [illegible] for new trial [illegible] for the plaintiff, [illegible] the testimony of the [illegible] and [illegible] [illegible] that the agency did not terminate when he paid [illegible] but [illegible] [illegible] continued by the principal.

It appears from the evidence that Mrs. Ray had sued Phillips, a son of the plaintiff, for seduction, and that this was the suit to be settled. It further appears that the case has never actually been settled—that it is not marked settled on the docket, nor has any of the money been paid—that terms of settlement were agreed upon between Howell, who was the attorney of Phillips, and Hopkins, who was the attorney of Mrs. Ray, but the agreement was not ratified by Mrs. Phillips, and was not satisfactory to her, but Howell felt that he was a sort of stakeholder, and declined to pay Mrs. Phillips the money unless he was protected by the judgment of a court, and that the real contest, deducible from all the facts, is between Mrs. Ray, who wants the money, and Mrs. Phillips, who is not satisfied with the terms Howell had agreed upon. So that the real question in the case is, can Mrs. Phillips, the settlement not being consummated, and she being a mere volunteer, and having stipulated that she should be paid back if the case was not settled to her satisfaction, get the money back from Howell? The object was to settle the seduction suit, and no settlement of it has been made, why she should not be permitted to change her mind and get the money back? We know of no law to the contrary. Nobody has been hurt. The suit is still pending for seduction, and it seems to us that Mrs. Phillips could recover back from Howell any time before settlement, at her option, on notice to him, even if she had not prescribed the terms of the settlement. But she has prescribed those terms, and the terms are among others things to be "in every way to her satisfactory." They are not to her satisfactory, and therefore, by the express words of the contract, Howell is "to return said one thousand dollars to said Mrs. Phillips or her legal representative," and we cannot see why she cannot recover it.

In this view of the case it is hardly necessary to consider the points made in the motion on the charge of the court, and its rulings on the evidence, the verdict being in our judgment contrary to the law and to the evidence, and the new trial being required on that ground in the motion.

The judgment being reversed, and a new trial awarded on this controlling ground, the presumption is that the city court will correct its other errors, if any, so as to conform to the judgment of this court.

We will add generally, however, that the criminal cases and Howell's policy in postponing the settlement of the suit for seduction on account of those cases, cannot affect this case on this contract; nor can any previous understanding of his with Judge Hopkins not communicated to Mrs. Phillips, and omitted by fraud, accident or mistake from the contract between Mrs. Phillips and Howell, in writing, alter the law springing from the writing.

In our view, the case does not make Mr. Howell a stakeholder at all, but, for the purpose for which Mrs. Phillips turned over the

money to him, he was her agent, subject to her control, and to be governed by her will in regard to this money until the settlement had been actually made. As Mrs. Phillips was a volunteer, and no consideration whatever passed to her from Howell or others, it was in her power to revoke her authority to him, and to take her money back at any time before he had parted with it in accordance with the agreement. 15 Ga. 486, 489, 490; 55 Ga. 198; Code, §§ 2183, 2188.

Judgment reversed.[1]

KOLB v. J. E. BENNETT LAND COMPANY.

1896. Supreme Court of Mississippi. 74 Miss. 567.

Calhoun, Sp. J.—Mr. Kolb signed and delivered to Mr. Jackson, an agent of the land company, an instrument in writing in these words: "This is to certify that I am owner in fee of the following lands (describing them), and that I hereby authorize and appoint J. E. Bennett Land Company as my agents to sell said lands, to the exclusion of all others, with the express understanding that they shall have a commission of ten per cent. of the consideration, when cash payment is made, regardless of who effects the sale, the following price and terms to govern said sale: $2,425 cash; terms easy. Deferred payments to draw interest at the rate of eight per cent. per annum, payable annually, all payments to be made on or before ————. Said sale to be effected within a period of January 1, 1896. I further agree to assist said J. E. Bennett Land Company in selling said land at the price named above, and to execute deed and furnish abstract of title showing said land clear of all incumbrance, on demand and in compliance with the above terms. In witness whereof I have hereunto subscribed my name, this twelfth day of April, 1895."

Before January 1, 1896, and without notice to the land company, Kolb sold his lands himself for $2,000, one-third cash and the balance on time. The land company sued him for 10 per cent. commissions on the amount paid and agreed to be paid Kolb by his vendee. The land company had taken steps to obtain purchasers, had adver-

[1] *Accord:* Gilbert v. Holmes, 64 Ill. 548.

"As to the agent, the principal's *power* to revoke is one thing and his *right* to revoke, in breach of the terms of the contract, is another, and such revocation may subject the principal to damages at the suit of the agent." Lamm, J., in Kilkpatrick v. Wiley, 197 Mo. 123, 167.

"When, indeed, a person is employed as an agent, traveler or salesman, for no definite time, the law does not imply a hiring by the year, but at the will of both parties, and the principal has a right to terminate it at any time, and to discharge the agent from his service without notice." Sharswood, J., in Kirk v. Hartman, 63 Pa. St. 97, 105.

[illegible] [illegible] [illegible] [

tised, had taken persons to see the property, and thought it would have effected a sale to one of them.

At the trial Kolb moved to dismiss, because the action was on the written contract instead of being for damages, and for want of jurisdiction in the justice's court, the plaintiff having reduced the claim from $242.50, the contract sum, to $200. Kolb sought to testify that, before he signed the contract, Jackson, the agent of the land company, told him it did not prevent him (Kolb) from himself selling at pleasure without commissions in such case to the land company, but the court refused to permit him to do so, and finally it gave the jury a peremptory instruction to find for the land company.

The stipulations by Kolb were purely unilateral. The land company was not a party to the power of attorney. It paid no consideration. It entered into no correlative obligation. If it had taken no step whatever in the execution of the purposes of the agency, it would not have incurred any liability to Kolb. He could not have sued it for damages for non-performance. If it had obtained a purchaser, even with the assistance of Kolb, ready and willing to buy, then its rights would have been perfect under contract sustained by an executed consideration. Under the agency it may have had a claim for reimbursement for expenses and trouble incurred in its prosecution up to the time of notice of revocation. But it does not sue for this, and we do not decide it. It sues on the alleged contract as if it were a party to it, and as if it were based on consideration.

An agent may proceed in the execution of such a power, or not proceed, as he chooses, and, if improperly thwarted by his principal, may, in a proper case, recover damages, but he cannot proceed under the stipulations of the power for commissions upon sale by the principal, which was itself a revocation of the agency. In this case the land company brought nobody to Kolb ready and willing to buy. It asked no assistance from him in negotiations with any probable purchaser who bought. Kolb found his purchaser, and sold without any suggestion from it. The object of the power was that the land company might effect a sale with or without the assistance of Kolb. Until it effected this, with or without Kolb's aid, it was entitled to nothing under the writing as a contract, unless because of the fact that, by its terms, the agency was exclusive and for a fixed term, and entitled it to commissions "regardless of who effects the sale," for which promise on the part of Kolb no consideration was given. One may, at pleasure, ignore a nude promise, and deal with the subject of it as he sees fit, with no other liability save that for damages in the way of expenses, etc., incurred in the prosecution of the subject of the promise before notice of its revocation. The object of notice of revocation is to stop these damages.

Nothing is better settled in the law than that an authority to sell land, when not coupled with an interest, may be revoked at the will of the principal. Am. & Eng. Ency. L., 2d ed., 1216, and authorities

cited in note 3. Nothing is better settled than that the phrase "coupled with an interest" means an interest in the thing sold (*ib.*, 1218, note 1), or than that a commission out of the proceeds of a sale to be made, is not such an interest (*ib.*, notes 3 and 4), and the sale of the property by the principal is a revocation (*ib.*, 1219, note 3). It is equally well settled that revocation of such authority may be made by the principal at his own pleasure, though the terms of the appointment declare that it shall be "exclusive" or "irrevocable." Mechem on Agency, sec. 204, and notes 3 and 4 thereto. All these propositions are removed from debatable territory. They are based on the ground of want of consideration. They can be based on no other. This express reason is given by Chief Justice Waite, speaking for the Supreme Court of the United States. U. S. Supreme Court Rep., vol. 125, p. 342, in Walker v. Walker.

In Walker v. Denison, 86 Ill. 142, the power contained these clauses:

"And said attorneys are to account to me for one-half of the net proceeds derived from the above sales, after deducting all necessary expenses therefrom. And this power of attorney is not revocable, and cannot be revoked within two years from this date."

The power was to sell patent rights in a prescribed territory. The principal sold without notice of revocation to the agent. The court held the principal could do this, on the express reason that "there is no undertaking on the part of Walker (the agent) in the instrument."

In Stensguard v. Smith, 43 Minn. 11, the power was, "In consideration of L. T. Stensguard agreeing to act as agent for the sale of the property hereinafter mentioned, I have hereby given to said L. T. Stensguard the exclusive sale, for three months from date, the following property." It then describes the lands and states the commissions. The agent immediately took steps to effect a sale, by advertising and by personal solicitation of purchasers. But, in one month after executing the instrument, the principal himself sold the land. Nevertheless, the court sustained the right of the principal to sell, and said, speaking of the instrument, "This alone was no contract, for there was no mutuality of obligation. The plaintiff (the agent) did not by this instrument obligate himself to do anything and, therefore, the other party was not bound," and the court denied the agent any compensation whatever, even for expenses; and said further, as to the agent: "He can recover nothing for what he did unless there was a complete contract, in which case, of course, he might have recovered damages for its breach."

On this requirement of mutuality, we refer also to Stier v. Imperial Life Ins. Co., 58 Fed. Rep. 847; Blackstone v. Buttermore, 53 Pa. St. 266; Wilcox v. Ewing, 141 U. S. 627; Story on Agency, § 476; McGregor v. Gardner, 14 Iowa 326; Chambers v. Seay, 73 Ala. 372.

It follows that the contract in the case at bar was without consideration, and did not prevent Kolb from dealing with his property as he saw fit.

The court erred in giving the peremptory instruction for plaintiff and in refusing a peremptory instruction for defendant.

Reversed and remanded.[1]

BROOKSHIRE v. BROOKSHIRE.

1847. Supreme Court of North Carolina. 8 Ired. 74.

Nash, J.—It is not denied by the plaintiff, that, in this case, it was within the power of the defendant to put an end to his agency, by revoking his authority. Indeed, this is a doctrine, so consonant with justice and common sense, that it requires no reasoning to prove it. But he contends, that it is a maxim of the common law, that every instrument must be revoked by one of equal dignity. It is true an instrument under seal cannot be released or discharged by an instrument not under seal or by parol, but we do not consider the rule as applicable to the revocation of powers of attorney, especially to such an one as we are now considering. The authority of an agent is conferred at the mere will of his principal and is to be executed for his benefit; the principal, therefore, has the right to put an end to the agency whenever he pleases, and the agent has no right to insist upon acting, when the confidence at first reposed in him is withdrawn. In this case, it was not necessary to enable the plaintiff to execute his agency, that his power should be under seal; one by parol, or by writing of any kind, would have been sufficient; it certainly can not require more form to revoke the power than to create it. Mr. Story, in his treatise on agency, page 606, lays it down that the revocation of a power may be, by a direct and formal declaration publicly made known, or by an informal writing, or by parol; or it

[1] "The mere fact that the power of attorney is itself declared irrevocable, does not prohibit its revocation." Baldwin, J., in MacGregor v. Gardner, 14 Iowa 326, 340.

"The power of attorney also provides that it is irrevocable; and although this is not conclusive, it nevertheless tends to prove that the parties understood that plaintiff (attorney) had an interest in the subject-matter upon which it was to operate." Vanclief, C., in Norton v. Whitehead, 84 Cal. 263, 270.

The disposal by the principal of the subject-matter of the agency revokes the authority of the agency. Bissell v. Terry, 69 Ill. 184; Torre v. Thiele, 25 La. Ann. 418; Wilson v. Harris, 21 Mont. 374.

"The assignment of the judgment, notice of which was given to the attorney, was undoubtedly a revocation of his authority to receive the proceeds of the execution. If his principal had parted with the right to control the judgment, it can hardly be questioned that the power of the attorney closed with it." Caton, C. J., in Trumbull v. Nicholson, 27 Ill. 148, 151.

may be implied from circumstances, and he nowhere intimates, nor do any of the authorities we have looked into, that when the power is created by deed, it must be revoked by deed. And, as was before remarked, the nature of the connection between the principal and the agent seems to be at war with such a principle. It is stated by Mr. Story, in the same page, that an agency may be revoked by implication, and all the text-writers lay down the same doctrine. Thus, if another agent is appointed to execute powers, previously intrusted to some other person, it is a revocation, in general, of the power of the latter. For this proposition, Mr. Story cites Copeland v. The Mercantile Insurance Company, 6 Pick. 198. In that case, it was decided that a power, given to one Pedrick to sell the interest of his principal in a vessel, was revoked by a subsequent letter of instruction to him and the master to sell. As then, an agent may be appointed by parol, and as the appointment of a subsequent agent supersedes and revokes the powers previously granted to another, it follows, that the power of the latter, though created by deed, may be revoked by the principal, by parol. But the case in Pickering goes further. The case does not state, in so many words, that the power granted to Pedrick, was under seal, but the facts set forth in the case, show that was the fact; and, if so, is a direct authority in this case. This is the only point raised, in the plaintiff's bill of exceptions, as to the judge's charge.

AHERN v. BAKER.

1885. Supreme Court of Minnesota. 34 Minn. 98.

Vanderburgh, J.—The defendant, on the ninth day of September, 1884, specially authorized one Wheeler, as his agent, to sell the real property in controversy, and to execute a contract for the sale of the same. He in like manner on the same day empowered one Fairchild to sell the same land, the authority of the agent in each instance being limited to the particular transaction named. On the same day, Wheeler effected a sale of the land, which was consummated by a conveyance. Subsequently, on the tenth day of September, Fairchild, as agent for the defendant, and having no notice of the previous sale made by Wheeler, also contracted to sell the same land to this plaintiff, who, upon defendant's refusal to perform on his part, brings this action for damages for breach of the contract.

This is a case of special agency, and there is nothing in the case going to show that the plaintiff would be estopped from setting up a revocation of the agency prior to the sale by Fairchild. A revocation may be shown by the death of the principal, the destruction of the subject-matter, or the determination of his estate by a sale, as

well as by express notice. The plaintiff had a right to employ several agents, and the act of one in making a sale would preclude the others without any notice, unless the nature of his contract with them required it. In dealing with the agent the plaintiff took the risk of the revocation of his agency. 1 Pars. Cont. 71.

Order affirmed, and case remanded.[1]

COPELAND v. MERCANTILE INSURANCE CO.

1828. Supreme Judicial Court of Massachusetts. 6 Pick. 198

Morton, J.—This is an action of assumpsit on a policy of insurance upon the brig Joseph for six months. The loss within that time by a peril insured against, and a reasonable notice and offer to abandon, are admitted.

The plaintiff procured the insurance to be made in his own name, for whom it might concern, and now alleges that it was made for the account and benefit of himself and three others, each of whom he avers was owner of one-quarter part at the time of the loss as well as at the date of the policy.

It is agreed by the defendants, that the several persons named in the declaration were interested in the manner alleged, at the time of effecting the insurance; and the defense is, that the plaintiff and Porter & Greene had sold their parts of the vessel before the loss, and at that time had no insurable interest in her.

Before the loss, John Pedrick, assuming to act as the attorney of the plaintiff and of Porter & Greene, executed a bill of sale purporting to convey their half of the vessel to Bright and Seaver, the owners of the other half. The first inquiry will be whether anything passed by this instrument. Pedrick's authority to convey must have been derived either from the power of attorney of the plaintiff, or from the letter of instructions from the plaintiff and Seaver to Pedrick and Bright of a subsequent date. There is no evidence in the case of any other authority from either of the former owners. Neither of these was executed by Porter & Greene, and the act of Pedrick was wholly unauthorized by them.

That the power of attorney, while in force, authorized Pedrick to sell the plaintiff's quarter, cannot be questioned. But the letter of instructions subsequently written by the plaintiff and Seaver, gave to Pedrick and Bright a joint authority to sell the two quarters of the plaintiff and Seaver. This was inconsistent with the authority before given by the plaintiff to Pedrick alone, and when he received the instructions, he must have understood them as a substitute for

[1] *Accord:* Clark v. Mullenix, 11 Ind. 532.

the former authority. They must therefore be considered a revocation of the power of attorney.

The letter of instructions conveyed to Pedrick and Bright a joint authority, which neither of them separately could execute. Co. Litt. 112 b, 181 b; Paley on Principal & Agent, 129; First Par. in Sulton v. Cole, 3 Pick. 244. The bill of sale was therefore unauthorized. It is manifest, too, that even had there been sufficient authority in the agent, it was not properly executed. The deed ought to have been in the name of principal, instead of the agent. It is not now the deed of the principal. Paley, 131, 132, 133, and cases there cited.

This bill of sale was therefore ineffectual to pass the property of the plaintiff and Porter & Greene; unless power may be derived from a subsequent ratification. The instrument is not so far void as to be incapable of becoming effectual by the adoption of the principals and this ratification may be by implication as well as by a direct sanction. The receipt by the owner, of the purchase money, would necessarily imply a ratification of the sale; but to be binding on the principal, the ratification must be made with a full knowledge of all the circumstances. Paley, 143, 144; Smith v. Cologan, 2 T. R. 189, note; Fenn v. Harrison, 3 T. R. 757.

In the case under consideration Pedrick communicated to the plaintiff the fact that he had sold, the price, and the names of purchasers, and other circumstances attending the sale. The plaintiff expressed no disapprobation, but in applying for a renewal of the policy for another term of six months, expressly stated that the brig was owned by Seaver and Bright. This could only have been true in consequence of his approbation of the sale by Pedrick. Also, upon the receipt of the bill drawn in payment for his quarter of the brig, he presented it for acceptance and demanded payment of it. These acts are sufficient evidence of a ratification on the part of the plaintiff.

The ratification of the sale on the part of Porter & Greene does not so clearly appear. According to the testimony of Pedrick, the money received in part payment for their quarter was placed to their credit and settled in their account. From the language used in his deposition, it does not clearly appear that this settlement was made with the knowledge and assent of Porter & Greene. They did, however, upon the receipt of the bill drawn for the remainder of the price for which their quarter was sold, present it for acceptance and for payment. These circumstances strongly tend to show, and perhaps will warrant the inference, that they assented to and confirmed the sale on their part. But still the question will recur, whether this sale passed anything to Bright and Seaver. Could Bright, being agent to sell, purchase either for himself or as agent for another?

It is a rule of law well settled, and founded in the clearest principles of justice and sound policy, that the agent of the seller cannot

the former authority. This must therefore be considered a revocation of the power of attorney.

The letter of instructions conveyed to [illegible] brought a joint authority, which neither of them separately [illegible] Co. Litt. 112 b, 181 b; Paley on Principal & Agent, 2nd Ed. 21; Sutton v. Cole, 3 Lev. 239. The bill of sale executed was unauthorized, as it manifestly was that even had [illegible] sufficient authority in the agent, it was not properly executed. No deed ought to have been in the name of principals instead of the agent. It is not now the deed of the principals. Paley, 139, 140, 141, and cases there cited.

This bill of sale was therefore ineffectual to pass the property of the plaintiff and Porter & Greene [illegible] power may be derived from a subsequent confirmation. The instrument is not so far void as to be incapable of becoming effectual by the adoption of the principals and this ratification may be by implication as well as by a direct sanction. The receipt by the owner of the purchase money, would necessarily imply a confirmation of the sale, but to be binding on the principal, [illegible] must be made with a full knowledge of all the circumstances. Paley, 144; Hay, Smith v. Colegan, 2 T. R. 187; [illegible] Swanston, 1 T. R. 787.

In the case under consideration Pedrick communicated to the plaintiff the sum for which sold, the price, and the names of purchasers, and the circumstances attending the sale. The plaintiff [illegible] and in applying for a renewal of the policy for another term of six months, expressly stated that the brig was insured by Porter and Greene. This could only have been true in consequence of his acquiescence in the sale by Pedrick. Also upon the receipt of the [illegible] on account for his quarter of the brig, he presented it to [illegible] and demanded payment of it. These facts are sufficient evidence of a confirmation on the part of the plaintiff.

The ratification of the sale on the part of Porter & Greene does not so clearly appear. According to the testimony of Pedrick the master received on [illegible] for their quarter was placed to their credit and settled in their account. From the [illegible] on his deposition, it does not clearly appear but this settlement was made with the knowledge and assent of Porter & Greene. Does the [illegible] upon the receipt of the bill drawn for the remainder of the price for which their quarter was sold present it for acceptance and for payment. These circumstances strongly tend to show, and very [illegible] warrant the inference, that they assented to and confirmed the sale on their part. But still the question will remain, whether this sale passed anything to Bright and Seaver. Could Pedrick, being agent to sell, purchase either for himself or as agent for another?

It is a rule of law well settled, and founded in the clearest principles of justice and sound policy, that the agent of the seller cannot

become the purchaser or the agent of the purchaser. These relations are utterly incompatible with each other. Paley, 32; Barker v. Mar. Ins. Co., 2 Mason 369; Church v. Mar. Ins. Co., 1 Mason 341. The attempt of Bright to become the purchaser of a part of the vessel was a breach of trust on his part, and could not divest the other owners of their interest.

Seaver had given to Bright no power to purchase for him, but had authorized and instructed him with Pedrick to sell his part. This act of Bright was therefore wholly unauthorized. Has Seaver ever adopted it? After he received information of the purchase, he procured insurance to be effected upon the vessel in his name for whom it might concern, for six months, to commence at the expiration of the former policy. It does not appear that he made a statement, or that any was made with his knowledge, of the names of the owners. This insurance might as well be procured by him, being owner of a quarter, as if he was owner of half. Nothing tending to show a ratification can be inferred from this circumstance. And the first opportunity which he has to act decisively upon the subject, he repudiates the contract. Before information of the loss of the vessel reached him, he refused to accept Bright's bills drawn in payment of the half which he had purchased. To hold this transfer to be valid, would be to compel him to become a purchaser without his consent.

Notwithstanding this breach of confidence on the part of Bright, the parties interested might waive all objection to his conduct and ratify his contract. And we have already seen that the acts of the plaintiff and of Porter & Greene have a strong tendency to show such waiver and ratification. But these acts were founded upon a reasonable presumption, that Seaver and Bright were to become joint purchasers and jointly responsible for the purchase money. The refusal of Seaver to adopt the contract and to accept Bright's bill, produced such an entire change of circumstances as furnished to the plaintiff and to Porter & Greene sufficient reasons for disavowing a contract which perhaps before they had intended to adopt. The bill of sale purporting to be a joint contract between the parties passed no property to Bright and Seaver, or either of them, and produced no change in the ownership of the vessel.

We are therefore all of opinion, upon the facts disclosed in the case, that Pedrick had no authority to make sale of the half of the brig, that Bright had no legal right to become the purchaser, either for himself or for Seaver, and that these unauthorized acts have never been so ratified as to change the property of the former owners. The interest in the vessel remained the same at the time of the loss that it was at the date of the policy, and is correctly stated in the first count in the plaintiff's declaration.

Since the commencement of the action Bright has disavowed it and annulled the authority of the plaintiff to prosecute it, so far

as that authority was derived from him. He might well prohibit the plaintiff from maintaining the suit for his proportion of the loss; but the policy was in the name of the plaintiff. The action is brought by him for the benefit of himself and the other owners; and it would be manifestly unjust that one owner, having received payment for his part of the loss, having compromised with the underwriters, or being unwilling to litigate the claim, should have the power to defeat the legal rights of the others. Bright might well revoke the power which he had given to the plaintiff to prosecute for his benefit, but he could not annul the authority which the other owners had given to sue for them, much less the right which he had to maintain the action in his own name for his own benefit. We are therefore well satisfied, that the plaintiff is entitled to judgment for his own quarter and those of Seaver and Porter & Greene, and the verdict must be amended accordingly.

After this opinion was delivered, Fletcher insisted that the declaration was insufficient. The plaintiff, being the agent in a joint contract for four, the action brought by him must be to enforce the whole contract. Besides, there is no count alleging the interest to be in three only, and the counts in which the whole interest is averred to be in some one of the three, are not supported by the evidence.

But Per Curiam.—We were inclined to think the first count sufficient to sustain a judgment for three-quarters of the sum insured; that as it stated correctly the interest of all the parties for whose benefit the suit was originally brought, the revocation by Bright of the authority to prosecute any further on his behalf, ought not to be allowed to prejudice the other parties concerned; but it is not necessary to determine this, as we are of opinion that judgment may be rendered for the plaintiff upon the other counts.[1]

[1] *Accord:* Morgan v. Stell, 5 Binn. (Pa.) 305.

In Rowe v. Rand, 111 Ind. 206, it was held that when two principals jointly appoint an agent to take charge of some matter in which they are jointly interested, and a severance of their joint interests afterwards occurs, the severance revokes the agency.

Revocation by letter is complete when the letter is received by the agent and not when it was mailed. Robertson v. Cloud, 47 Miss. 208.

In Rees v. Pellow, 97 Fed. Rep. 167, a letter revoking an agent's authority was addressed to the agent's place of business and delivered there. The agent was absent at the time, and did not receive the letter till several weeks later. It was held that the agency was revoked from the date of the delivery of the letter. See discussion of this case in 13 Harv. Law Rev. 523.

as that authority was derived from him. He might well preclude the plaintiff from maintaining the suit for his proportion of the loss, but the policy was in the name of the plaintiff. The action is brought by him for the benefit of himself and the [illegible]. And it would be manifestly unjust that one owner having received payment for his part of the loss, having compromised with the underwriters, or being unwilling to litigate the claim, should have the power to defeat the legal rights of the others. Bright might well revoke the power which he had given to the plaintiff to prosecute for the amount, but he could not annul the authority which the other owners had given to sue for them, much less the right which he had to maintain the action in his own name for his own benefit. We are therefore well satisfied, that the plaintiff is entitled to judgment for his own [illegible], and those of Seaver and Porter & Greene, and the verdict must be amended accordingly.

After this opinion was delivered, Fletcher insisted that the declaration was insufficient. The plaintiff, being the agent in a joint contract for [illegible] interest brought by him must be to enforce the whole contract. Besides, there is no count alleging the interest to be in those only, and the counts in which the whole interest is averred to be in some one of the three are not supported by the evidence.

Per Curiam. — We were inclined to think the first count sufficient to support a recovery for three-quarters of the sum insured: that [illegible] the interest of all the parties for whose benefit the suit was originally brought, the revocation by Bright of the authority to prosecute any further on his behalf, ought not to be allowed to prejudice the other parties concerned; but it is not necessary to determine that point, as we are of opinion that judgment may be rendered for the plaintiff upon the other counts.[1]

Accord. Morgan v. Bell, 1 Hen. (Va.) 395.

In Rowe v. Ward, 1 Esp. 236, it was held that where two principals contract against an agent to take charge of some matter in which they are jointly interested, and a severance of their joint interests afterwards occurs, the covenant remains the same.

Revocation by letter is complete when the letter is received by the agent and not when it was mailed. Dunlap v. Snell, 47 Miss. 268.

In Ross v. Pollock, 47 Fed. Rep. 162, a letter revoking an agent's authority was addressed to the agent at [illegible] and delivered there. The agent was absent at the time, but [illegible] the letter. It was held that the agent was protected from the date of the receipt of the letter. See discussion of this case in 13 Harv. Law Rev. 239.

LEWIS v. ATLAS MUTUAL LIFE INS. CO.

1876. Supreme Court of Missouri. 61 Mo. 534.

Wagner, J.—This was an action to recover damages for breach of a contract of agency. By virtue of the contract the plaintiff became the general agent of the defendant for the state of Illinois, for the term of five years. By the provisions of the contract the plaintiff agreed to work exclusively for the company during its continuance. He was also bound to work the territory with a full corps of energetic and reliable agents. He had all the authority of a general agent in soliciting insurance and collecting premiums. His remittances were to be on the 10th of each month, at the time of his monthly reports. As compensation for his services and expenditures, he was to have 35 per cent. on first premiums, prior to July 1, 1870, and 30 per cent. after that, 10 per cent. on term insurance and paid up policies, and 10 per cent. on all renewals. These premiums on renewals were to be paid to him and his heirs after the expiration of the five years, provided he continue to be the agent of the company for that term, and performed the conditions of the contract required of him. He was also to have $250 per year, for rent of office at Springfield, Illinois. It is averred in the petition that the plaintiff discharged the duties of the contract devolving upon him, until the 2d day of March, 1872, at which time the defendant discontinued its business in Illinois, and failed and refused to permit plaintiff to further prosecute the duties as agent there; that on the 24th of April, 1872, the defendant voluntarily sold and transferred the whole of its business and its assets to the St. Louis Mutual Life Insurance Company, thereby discontinuing its business and depriving itself of the power to keep and perform its part of the contract.

The answer denies the breaches, and also sets out, as an excuse for the discontinuance of its business in Illinois and elsewhere, that on account of the insufficiency of its assets and property, it was unable to comply with the laws of Illinois and Missouri, and that on the 24th of April, 1872, it caused all its policies to be re-insured in the St. Louis Mutual Life Insurance Company, and that the plaintiff sanctioned the re-insurance. The evidence showed conclusively, and about that there is no question, that the defendant discontinued its business in Illinois on the 2d of March, 1872, and that it sold out entirely to the St. Louis Mutual Life Insurance Company on the 24th of April, 1872.

It was an unqualified sale of all its property and rights. The cause was tried before the circuit court with a jury, and a verdict was found for the plaintiff, upon which judgment was rendered. At general term this judgment was reversed, and plaintiff prosecuted his appeal to this court.

There are but two questions arising on the record of any import-

ance, and the first is, whether the insolvency and inability of the company to carry on its business, is any legal excuse for the breaches of the contract; and the second relates to the measure of damages. The court held, by its instructions, that the inability of the defendant to continue its business, was no excuse for its breach of contract with the plaintiff.

It appeared at the trial that the plaintiff was only permitted to conduct his agency about half the time agreed upon by the stipulation. During that time he procured a large number of policies and the annual renewals were shown to be very valuable.

It is now argued on behalf of the defendant, that by the terms of the contract sued on, the plaintiff was merely appointed agent for the company, for the period of five years, and, as the company did not expressly bind itself to continue in business for that length of time, that its inability to act and execute the whole stipulation on its part, constituted no breach. It is true, there was no positive and direct covenant on the part of the company to carry on the business for any definite time. But the plaintiff agreed to act exclusively for the company for the term of five years, and had he neglected or failed, he would have been liable in damages. If he was bound for that length of time, it necessarily follows that the company must also have been bound; for mutuality was essential to the validity of the agreement.

It very frequently happens that contracts on their face and by their express terms appear to be obligatory on one party only; but in such cases, if it be manifest that it was the intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a corresponding and correlative obligation on the other party, such corresponding and correlative obligation will be implied. As, if the act to be done by the party binding himself can only be done upon a corresponding act being done or allowed by the other party, an obligation by the latter to do or allow to be done the act or things necessary for the completion of the contract, will be necessarily implied. (Pordage v. Cole, 1 Wm. Saund. 319; Churchward v. The Queen, 6 B. & S. 807; Black v. Woodrow, 39 Md. 194.) When the plaintiff bound himself to give his exclusive services to the defendant for the period of five years, there was a correlative and corresponding obligation upon the part of the defendant, to give him employment and allow him to pursue and execute the terms of the contract. This was manifestly the intention of the parties. The defendant's insolvency or inability furnished no excuse for its breach of the contract. Had it desired to be exempted from liability in such an event, it should have stipulated for the exemption upon the happening of the contingency.[1] * * *

Judgment affirmed.[2]

[1] A portion of the opinion dealing with the measure of damages is omitted.

[2] Regarding renunciation of the agency by the agent see Stoddart v. Key, 62 How. Pr. (N. Y.) 137.

FELLOWS AND ANOTHER v. HARTFORD & NEW YORK STEAMBOAT CO.

1871. SUPREME COURT OF ERRORS OF CONNECTICUT. 38 Conn. 197.

SEYMOUR, J.—This is an action of assumpsit on the common counts, and comes before us by reservation for our advice on a very detailed statement of facts found by the court of common pleas. The questions discussed at the bar are mixed questions of law and fact. In order to a full understanding of the case the entire statement of facts is needed, and is as follows:

The plaintiffs are a co-partnership, doing business in Hartford, and sold the goods described in their bill of particulars, which were delivered by the plaintiffs on board the boats of the defendants, and were used thereon. The defendants were a corporation, organized under a charter of the state of Connecticut, and engaged in running steamers which carried passengers and freight between New York and Hartford. Two of the steamers so used were severally named "The City of Hartford," and "The State of New York." The defendants had been so engaged in business for several years, and employing said boats (among others which they were accustomed to run on said route) each season from the opening of navigation till its close in the fall. Prior to the spring of 1868 the defendants had been accustomed to furnish their own provisions and supplies, to board their own officers and crews on said boats, and supply meals to passengers thereon, and had required and employed stewards, or persons acting in that capacity, on each of them.

Up to this time the president of the company, or some person specially authorized by him, or under his direction, had purchased the greater part of the provisions used on said boats, but the stewards had been allowed to purchase from time to time such supplies as were deficient, in the name of the defendants and on their credit, and the bills so made had always been paid or allowed by the defendants, and usually settled for at the end of the trip, or soon after. In the spring of 1867, and during that season, the defendants had employed Mr. Knox as keeper of their store of provisions, and he by special authority purchased a large portion of the supplies for provisioning the boats, some of them of the plaintiffs, who charged them to "the New York Steamboat Company." And from time to time during that season the plaintiffs presented their bills for such supplies, endorsed by Knox as correct, for payment to the treasurer of the company, who paid them. In the spring of 1868 the defendants proposed to make a change, by ceasing to furnish their own provisions and supplies for their boats, and to contract with some party to board the officers and crew of each boat at a certain price per week, such contractor also to provide meals and supplies for passengers, and take the pay therefor, and the defendants advertised in newspapers in

Hartford for written proposals for such contracts. None of the written proposals received were accepted, but the defendants entered into a contract with U. T. Smith, of Hartford, to board the officers of the "State of New York" at $7 per week, and the crew at $6 per week, Smith to have the right to supply the passengers with meals, and to have the use of the bar on the boat, he furnishing his own supplies and provisions. The defendants also made a contract with one Silloway, of Hartford, to board the officers and crew of the "City of Hartford," on the same terms as Smith had contracted for the "State of New York." Smith and Silloway each went on their respective boats, and accompanied them on their several trips, discharging the duties which had previously been performed by the stewards of the boats, and severally purchased all the supplies, and procured them to be delivered upon their respective boats. Smith had, for several years prior to entering into the aforesaid contract for provisioning the boat, been steward of the "State of New York," and had while so acting made purchases of the plaintiffs of goods to be used on said boat, upon the credit of the defendants, which were paid for by the defendants, as aforesaid. Silloway had never been in the employ of the defendants in any capacity. During the season of 1868 Smith and Silloway presented to the defendants their bills for the board of the officers and men, which were paid in full, weekly. During the boating season of 1868 Smith procured of the plaintiffs goods for which there remains due a balance of $13, which were by his directions, delivered on board the "State of New York," and used thereon, and were charged by direction of Smith on the plaintiffs' books to the "State of New York." And Silloway made similar purchases of the plaintiffs, which were by his direction charged to the steamer "City of Hartford," and delivered upon said boat, and for which there is now a balance due. It appeared that the plaintiffs were not aware of the contracts that had been made between the defendants and Smith and Silloway, and charged the goods as directed supposing they were selling to the Hartford and New York Steamboat Company, and would not have given credit to either Smith or Silloway, who were pecuniarily irresponsible. The plaintiffs had, the year previous, by direction of the stewards or other persons purchasing for the boats, charged the goods to the "New York Steamboat Co." The defendants did not give special notice to the plaintiffs of any change in their mode of victualling their boats, nor did they advertise the same in the newspapers, or otherwise, except the before-mentioned advertisement for proposals. The defendants gave no express authority to either Silloway or Smith to contract any bills in their name, and had no knowledge that they had done so until after the bills had been contracted.

We think the defendants are liable for the goods purchased by Smith. It appears that he had been their steward, and had on their credit purchased goods of the plaintiffs to be used on the boat, and

Hartford for written proposals for such outfitting. Three of the written proposals received were accepted, and the defendants entered into a contract with C. T. Smith, of Hartford, to board the officers of the "State of New York" at $7 per week, and the crew at $5 per week. Smith to have the right to supply the passengers with wines and to lease the use of the bar on the boat, he furnishing his own supplies and provisions. The defendants also made a contract with one Silloway of Hartford to board the cabmen and waiters of the "City of Hartford," on the same terms as Smith had contracted for the "State of New York." Smith and Silloway each went on their respective boats and accompanied them on their several trips, discharging the duties which had previously been performed by the stewards of the boats and generally purchased all the supplies and procured them to be delivered upon their respective boats. Smith had, for several days prior to entering into the aforesaid contract for provisioning the boat, been steward of the "State of New York," and had also been acting as purchaser of the plaintiffs of goods to be used on said boat upon the credit of the defendants, which were paid for by the defendants, as aforesaid. Silloway had never been in the employ of the defendants in any capacity. During the season of 1868 Smith and Silloway presented to the defendants bills for the board of the officers and men, which were paid by the defendants. During the boating season of 1868 Smith procured of the plaintiffs goods for which there remains due a balance of $43, which were ordered by directions, delivered on board the "State of New York" and used thereon, and were charged by direction of Smith on the plaintiffs' books to the "State of New York." And Silloway made similar purchases of the plaintiffs, which were by his direction charged to the steamer "City of Hartford," and delivered upon said boat and for which there is now a balance due. It appears that the plaintiffs were not aware of the contracts that had been made between the defendants and Smith and Silloway, and charged the goods as directed supposing they were selling to the Hartford and New York Steamboat Company and would not have given credit to either Smith or Silloway, who were personally irresponsible. The plaintiffs and the year previous, by direction of the stewards or other persons managing for the boats, charged the goods to the "New York Steamboat Co." The defendants did not give special notice to the plaintiffs of any change in their mode of furnishing their boats, nor did they advertise the same in the newspapers or otherwise, except the before-mentioned advertisement for proposals. The defendants gave no express authority to either Silloway or Smith to contract any bills in their name, and had no knowledge that they had done so until after the bills had been contracted.

We think the defendants are liable for the goods purchased by Smith. It appears that he had been their steward, and had on their credit purchased goods of the plaintiffs to be used on the boat, and

that the defendants had paid for the goods thus purchased, without objection. The goods, for the price of which this action is brought, were charged to the defendants, the plaintiffs supposing they were selling them to the defendants, and credit would not have been given to Smith, he being pecuniarily irresponsible. The defendants then had treated Smith as their servant, and represented him as authorized to make purchases on their credit. The case is the common one where the liability of the master is established by the authorities, unless it can in some important particular be distinguished. The defendants rely on several circumstances as sufficient to create a difference; before considering which we will briefly notice some principles and rules which have been adopted in this class of cases.

It is well settled that where a general authority has once been conferred, its revocation takes effect as to third persons only after it becomes known to them, unless indeed the principal has done his full duty in making it known; and where an authority is revoked, it is in general the duty of the principal to notify those persons who have had dealings with the agent as such; the rules on this subject being substantially the same as those relating to the dissolution of a co-partnership, and the power of a partner after dissolution to bind the firm. Story Agency, §§ 470, 471. 1 Parsons Contracts, 59, 60.

Now in regard to Smith, it appears that he for several seasons was authorized to bind the defendants by contracts with the plaintiffs similar to that on which this suit is brought, and that the defendants have done nothing to notify the public in general, or these plaintiffs in particular, of any revocation of authority, and that the plaintiffs were not in fact aware of a revocation.

The defendants, however insist that there were circumstances which ought to have put the plaintiffs on inquiry, and it is certainly true that the manner of dealing under which the account in suit accrued was somewhat different from what it had been in previous years. But we see nothing at all equivalent to notice of the withdrawal of Smith's authority. The advertisement relied upon was merely for proposals for letting the stewardship out upon contract. Even if the plaintiffs had seen the advertisement, they could not know that any proposals were made, or that if made they were accepted or acted upon. The advertisement was not intended as a notice of authority withdrawn, and in our judgment it falls far short of such a notice as was necessary.[1] * * *

We advise that judgment be rendered for the plaintiffs for the goods delivered to Smith. In this opinion the other judges concurred.[2]

[1] A portion of the opinion dealing with the liability of the defendants for the goods purchased by Silloway is omitted.

[2] "A person who has dealt with an agent in a matter within his authority, has a right to assume, if not otherwise informed, that the authority continues, and when the dealing continues after the authority is revoked, the principal is

Section 3.—By Operation of Law.

DAVIS, ADMINISTRATOR OF WARDNER v. THE WINDSOR SAVINGS BANK.

1873. Supreme Court of Vermont. 46 Vt. 728.

Pierpont, Ch. J.—The only question presented by the bill of exceptions is, whether the defendant bank was justified in paying the money which it held to the credit of the deceased, to Mrs. Dudley, his sister, who deposited the money as his agent, such payment being made after the revocation of her agency by the death of her principal, said bank having no knowledge of such death, and paid the money in good faith. That the death of the principal terminates the agency, all the authorities agree; but the effect of such death upon the acts of those who in good faith deal with the agent without knowledge of the death, is a subject upon which there is some diversity of decision. But the weight of authority seems to be decidedly in favor of the principle, that the death of the principal instantly terminates the power of the agent, and that all dealings with the agent subsequent to that event, are void and of no effect, even though the parties were ignorant of that fact. Kent lays down the rule, that "the authority of an agent determines by the death of his principal. By the civil law, the acts of an agent done *bona fide* after the death of the principal, and before notice of his death, are valid and binding on his representatives. But this equitable principle does not prevail in the English law, and the death of the principal is an instantaneous revocation of the authority of the agent, unless the power be coupled with an interest." 2 Kent Com. 646. Story lays down the same doctrine, and says: "As the act of the agent must, if done at all, be done in the name of the principal, it is impossible that it can properly be done, since a dead man can do no act, and we have already seen that every authority executed for another person, presupposes that the party could at the time, by his personal execution of it, have made the act valid;" and numerous authorities, both English and American, are referred to in support of the position. This principle was expressly held in Bank v. The Estate of Leavenworth, 28 Vt. 209, and also in Mich. Ins. Co. v. Leavenworth, 30 Vt. 11. In the latter case, Judge Bennett, in delivering the opinion, says: "Though it may be true that when a power is revoked by the act of the party, notice may be necessary, yet when revoked by his death, the revocation at once takes effect; and if an act is subsequently done under the power, though without notice of the death of the party,

nevertheless bound, unless notice of the revocation is brought home to the other party." Andrews, J., in McNeilly v. Continental Life Ins. Co., 66 N. Y. 23, 28.

Section 3.—By Operation of Law.

DAVIS, ADMINISTRATOR OF WADDELL, v. THE WINDSOR SAVINGS BANK.

1877. Supreme Court of Vermont. 49 Vt. 186.

[Trover. Cit. 1.]—The only question presented by the exceptions is whether the individual note was [illegible] the money which it held as the result of the deposit in the bank, the depositor having died, is the agent, such payment being made after the revocation of his agency by the death of his principal, said bank having no knowledge of such death, and paid the money in good faith. That the death of the principal terminates the agency, as to the subsequent action of the agent, and the effect of such death upon the acts of those who in good faith deal with the agent without knowledge of the death, is a subject upon which there is some diversity of decision. But the weight of authority seems to be decidedly in favor of the principle that the death of the principal instantly terminates the power of the agent, and that all dealing with the agent subsequent to that event are void and of no effect, even though the party [illegible] Kent lays down the rule that "the authority of the agent is revoked by the death of his principal. By the civil law, the powers of an agent [illegible] after the death of the principal, till the intelligence of his death are valid and binding on the representatives of the principal. But reasonable principles do not prevail in the English law, and the maxim is the contrary to an instantaneous revocation of the authority of the agent, unless the power be coupled with an interest." 2 Kent Com. 645. Story lays down the same doctrine and says: "As the power dies, the agent must, if done at all, so close to the event of the principal's death as to render it impossible that it can properly be done, unless it could also be done in no act, and we have already seen that every authority executed for another person, presupposes that the party could at the time of his personal execution of it have made the act valid." And numerous authorities, both English and American, are referred to in support of the position. This principle was expressly held in [illegible] The Estate of Leavenworth, 28 Vt. 209, and also in Michigan [illegible] Leavenworth, 30 Vt. 11. In the latter case Judge Redfield in delivering the opinion says: "Though it may be true that when a power is revoked by the act of the party, notice may be necessary, yet when revoked by his death, the revocation at once takes effect, and if an act is subsequently done under the power, though without notice of the death of the party,

revocation is found, unless notice of the revocation is brought home to the other party." Andrews, J., in Metcalfe v. Centennial Ins. Co., 16 N. Y. 11 at 28.

the act is void." Many other cases might be referred to in support of the rule, but I do not deem it necessary.[1]

A different doctrine was held in Cassidy v. McKenzie, 4 Watts & Sergt. 282; but as is said in a note to 2 Kent Com. 873, "It is substituting the rule of the civil for the rule of the common law."

Indeed it is difficult to see how there can be an agent when there is no principal. The question whether in this case there was an interest coupled with the agency, and some other questions that were discussed in the argument, do not arise upon the exceptions as made up.

Judgment reversed and cause remanded.

CASSIDY v. M'KENZIE.

1842. Supreme Court of Pennsylvania. 4 W. & S. 282.

Rogers, J.[2]—* * * But, finally, it is contended that a payment, after the death of the principal, is not good. It is conceded that the death of the principal is *ipso facto* a revocation of a letter of attorney. But does it avoid all acts of the attorney intermediate between the death of the principal and notice of it? In Salte v. Field (5 Term. 214), Mr. Justice Buller observes: "It has been questioned with respect to an agent acting under a power of attorney, whether acts done by him before he knows of the revocation of his warrant, are good against the principal; and it seems that the principal in such case could not avoid the acts of his agent, done *bona fide*, if they were to his disadvantage, though he might consent to avoid such as were for his benefit." And in Hazard v. Treadwell (Str. 506); 12 Mod. 346, it is ruled, that the credit arising from an ostensible employment continues at least with regard to those who have been accustomed to deal on the faith of that employment until they have notice of its being at an end, or till its termination is notorious. And these are principles founded on most obvious justice. Thus, if a man is the notorious agent for another to collect debts,

[1] "No principle is better settled than that the powers of an agent cease on the death of his principal. If an act of agency be done subsequent to the decease of the principal, though his death be unknown to the agent, the act is void." M'Lean, J., in Galt v. Galloway, 4 Pet. (U. S.) 332, 344.

"The reason of that rule is, that upon the death of the principal his estate belongs to his heirs, devisees, or creditors; and their rights cannot be impaired by any act of one who was not their agent, and who had no control over their property." Isham, J., in Michigan State Bank v. Estate of Leavenworth, 28 Vt. 209, 216.

"There can be no agent where there is no principal." Danforth, J., in Weber v. Bridgman, 113 N. Y. 600, 605.

[2] A portion of the opinion is omitted.

it is but reasonable that debtors should be protected in payments to the agent until they are informed that the agency has terminated. But this, it is said, is only true of an agency terminated by express revocation, and does not hold, of an implied revocation by the death of the principal. It would puzzle the most acute man to give any reason why it should be a mispayment when revoked by death, and a good payment when expressly revoked by the party in his lifetime.

In Watson v. King (4 Camp. 272), however, it is ruled: "That a power of attorney, though coupled with an interest, is instantly revoked by the death of the grantor; and an act afterwards *bona fide* done under it by the grantee before notice of the death of the grantor is a nullity. Lord Ellenborough says, a power coupled with an interest cannot be revoked by the person granting it; but it is necessarily revoked by his death. How can a valid act be done in the name of a dead man?" It will be observed that the reason is purely technical. How can a valid act be done in the name of a dead man? And it might with as much propriety be asked, how can a valid act be done by an agent whose authority is revoked by his principal?

But, notwithstanding the opinion thus confidently expressed, it is now an admitted exception that where the power or authority is coupled with an interest in the thing actually vested in the agent, then an act done by him after the death of his principal is good. And the reason given by Chief Justice Marshall in Hunt v. Rousmanier (8 Wheat. 174), is, that the agent, having the legal title in the property, is capable of transferring it in his own name, notwithstanding the death of the principal; and the death of the principal has no operation upon his act. The power given by the principal is, under such circumstances, rather an assent or agreement that the agent may transfer the property vested in him, free from all equities of the principal, than strictly a power to transfer. The whole reasoning of the court, in Hunt v. Rousmanier, shows their anxiety to rid themselves of the absurdity into which a strict adherence to the principle that death is a revocation of a power, would lead them. Why not place it on the rational ground, that although the conveyance would be bad at law, yet it would be good in equity when made *bona fide* without any notice whatever of the death of the principal. But be this as it may, the principle does not apply here. There is no act to be done. This money has been paid by the debtor, and received by the agent in good faith; and why should it not be good when the authority is revoked by death, as it confessedly is when expressly revoked by the principal in his lifetime? Here the precise point is, whether a payment to an agent when the parties are ignorant of the death is a good payment. In addition to the case in Campbell before cited, the same judge, Lord Ellenborough, had decided in 5 Esp. 117, the general question that a payment after the death of principal is not good. Thus, a payment of sailor's wages to a person having a power of attorney to receive

them, has been held void when the principal was dead at the time of payment. If, by this case, it is meant merely to decide the general proposition that by operation of law the death of the principal is a revocation of the powers of attorney, no objection can be taken to it. But if it is intended to say that this principle applies where there was no notice of death, or opportunity of notice, I must be permitted to dissent from it.

In addition, it is contrary to the opinion of Lord Loughborough in Tate v. Hilbert (2 Ves. Jun.), where, on a question whether a check given by a dying person to a relation, but not presented in his lifetime, could be enforced as *donatio causa mortis* against the executor, he said, if the donee had received the money upon the check immediately after the death of the testator, and before the cashier was apprised of it, he was inclined to think no court would have taken it from him. And what would he have said if the attempt had been made to subject the banker, when he was ignorant of the death? But, if this doctrine applies, why does it not apply to the case of factors, foreign or domestic, to commission merchants, to supercargoes, and masters of ships, and to various other agencies which the necessities of commerce may require. In the case of a foreign factor, for example, has it been supposed that his acts, after this implied revocation of authority are void? Cases of this kind must often have occurred and it would astonish the mercantile world to be informed that the factor was liable on a contract made in the name of his principal because he was dead, a fact of which he was ignorant, and of which he could not by any possibility be informed, or that the merchant who was trusting his goods on the credit of the principal was to be cast on him who may have been of doubtful solvency, for payment. Can it be, that a payment made to an agent from a foreign country, and from one of our cities to the Western States, employed for the special purpose of collecting debts, is void because his principal may have died the very day before the actual receipt of the money? That a payment may be good to-day or bad to-morrow from the accidental circumstance of the death of the principal, which he did not know, and which by no possibility could he know? It would be unjust to the agent and unjust to the debtor. In the civil law, the acts of the agent, done *bona fide* in ignorance of the death of his principal, are held valid and binding upon the heirs of the latter. The same rule holds in the Scottish law, and I cannot believe the common law is so unreasonable, notwithstanding the doubts expressed by Chancellor Kent in the second volume of his Commentaries 646.

These principles dispose of all that will be material on another trial.

Judgment reversed, and a *venire de novo* awarded.[1]

[1] "Where the act, notwithstanding the death of the principal, can and may be

CARRIGER'S ADMINISTRATOR v. WHITTINGTON'S ADMINISTRATOR.

1858. Supreme Court of Missouri. 26 Mo. 311.

This was an action by the administrator of Christian Carriger to recover certain sums of money alleged to have been received by William W. Whittington, defendant's intestate, as the agent of said Carriger. Evidence was introduced that in 1846 said Carriger had a pre-emption claim; that he went to California leaving Whittington his agent; that he received the rents accruing, and also sold the claim to one De Witt; that he received in 1847 fifty dollars for rent of this land; in 1848 twenty dollars; that in 1850 he received from De Witt five hundred dollars, the purchase money agreed to be paid for the pre-emption claim; that Carriger died in 1846 on the way to California. It did not appear that his death was known to Whittington and De Witt at the time of the sale. The court instructed the jury as follows: "If the jury believe from the evidence that William Whittington, as the agent of Christian Carriger, received of Neff, in the spring of 1847, fifty dollars, and in the spring of 1848, of Patton, twenty dollars, and in the spring of 1850, of De Witt, five hundred dollars, with interest, for the price of Carriger's farm, and that the plaintiff, Charles F. Holly, as public administrator of Andrew county, has charge of said Carriger's estate, they will find for the plaintiff the amount so received by said Whittington."

The court refused the following instructions, among others, asked by defendant: "1. Unless the jury believe from the evidence that Christian Carriger was alive at the time William Whittington made the sale and received the money in evidence, they will find for de-

done in the name of the agent, there seems to be a sound reason why his death should not be deemed to be a positive revocation under all circumstances, and that a subsequent execution of it may be valid." Story on Agency, § 495. This statement has the basis of decision in Dick v. Page, 17 Mo. 234, and Lenz v. Brown, 41 Wis. 172.

See the able and elaborate discussion of the various views and authorities on the subject of revocation by death in Ish v. Crane, 8 Ohio St. 520, and 13 Ohio St. 574. On page 540 of 8 Ohio St. Sutliff, J., says: "Now upon what principle does the obligation, imposed by the acts of the agent after his authority has terminated, really rest? It seems to me the true answer is, public policy. The great and practical purposes and interests of trade and commerce, and the imperious necessity of confidence in the social and commercial relations of men, require that an agency, when constituted, should continue to be duly accredited. To secure this confidence, and consequent facility and aid to the purposes and interests of commerce, it is admitted that an agency, in cases of *actual* revocation, is still to be regarded as continuing, in such cases as the present, toward third persons, until actual or implied notice of the revocation. And I admit that I can perceive no reason why the rule should be held differently in cases of revocation by mere operation of law." Quoted with approval in Deweese v. Muff, 57 Neb. 17, and Meinhardt v. Newman, 71 Neb. 532. See note in 12 Harv. Law Rev. 563.

CARRIGER'S ADMINISTRATOR v. WHITTINGTON'S ADMINISTRATOR

1825. SUPREME COURT OF MISSOURI. 3 Mo. 307.

This was an action by the administrator of Carriger against the administrator of Whittington to recover certain sums of money alleged to have been received by William W. Whittington, for Carriger's use, out of the estate of Carriger. The cause was submitted to the court upon the following agreed statement of facts: That in 1826 and 1827 Carriger had a pre-emption right to the north east quarter of section number ten (10) in township number fifty-one (51) north of range number two (2) west of the fifth principal meridian, and that he entered the same in the name of one De Witt. That he removed in 1847 fifty dollars for said quarter section to the land office at Fayette, Missouri; that in 1850 he received from De Witt five hundred dollars. The purchase money agreed to be paid for the pre-emption claim. Carriger died in 1850 on the way to California. By the agreement first between Whittington and De Witt and the sale of the land. The court instructed the jury as follows: "If the jury believe from the evidence that William Whittington, the agent of Carriger, received of De Witt, in the agreement for fifty dollars and in the spring of 1850 [illegible] and in the spring of 1850 of Carriger's [illegible] public administrator of Howard county, and [illegible] Carriger's estate, they will find for the plaintiff for the amount so received by said Whittington."

The court refused the following instructions asked by defendant: "If the jury believe from the evidence that Christian Carriger was dead at the time William Whittington made [illegible] they will find for the

[illegible] Carriger [illegible] Whittington [illegible] Carriger [illegible] Whittington [illegible] Carriger [illegible] Whittington [

fendant. 2. If the said William Whittington was the agent of Christian Carriger, deceased, and received the money in evidence as such agent, then the jury will find for the defendant, unless the plaintiff has proved that said money was demanded before the commencement of this suit. 5. If more than five years have elapsed since said money was received and before suit, they will find for defendant. 6. If the jury find from the evidence that Carriger merely authorized William W. Whittington to sell for him, the said Carriger, the land mentioned in evidence, then so soon as said Carriger died said Whittington had no further authority to act as such agent; and if he was so dead at the time of said sale then the jury will find for the defendant."

Napton, J.—It does not appear in this case whether at the time of the sale of the pre-emption by Whittington to De Witt the death of the principal, Carriger, was known to the parties or not. It is inferable that at the time of the payment of the purchase money to the agent, in 1850, Carriger's death was known to both parties. It is probable that when the contract was made in 1847, Carriger's death, which took place in the previous summer on his way to California, was not known to either.

Although by the common law an agency terminated by the death of the principal, and all subsequent acts of the agent cease to bind his heirs or executors, yet judicial tribunals, especially those having equitable jurisdiction, have, for the convenience of trade and commerce and in accordance with the principals of natural justice, very much modified this doctrine. When the death of the principal is unknown to both parties at the time the contract is made, so that there is no binding contract on him or his representatives, the agent is not personally responsible. (Smout v. Ilbery, 10 Mees. & Wels. 1; Story on Agency, § 265; Blader v. Free, 9 Barn. & Cress. 167.) In Cassiday v. McKenzie, 4 Watts & Serg. 282, the supreme court of Pennsylvania declared in good sense and sound reason there was no difference between a revocation of an agency by the act of the principal and a revocation by his death, which was the act of God, and that in either case, where the parties dealing were acting in good faith and ignorant of the revocation, the principal or his representatives ought to be bound. In neither case did the court suppose the agent would be; and they repudiate the opinion of Lord Ellenborough, in Watson v. King, 4 Camp. 5 Esp. 117, and of Lord Loughborough, in Tate v. Hilbert, 2 Ves. Jr. —, where a power of attorney, though coupled with an interest, was held to be instantly revoked by the death of the grantor.[1] * * * The other judges concurring, judgment affirmed.[2]

[1] A portion of the opinion is omitted.

[2] Death of the agent terminates the agency. Adriance v. Rutherford, 57 Mich. 170.

In Jackson Insurance Co. v. Partee, 9 Heisk. (Tenn.) 296, a factor trans-

DAVIS v. LANE.

1839. Superior Court of New Hampshire. 10 N. H. 156.

Assumpsit, upon a promissory note.

It appeared in evidence that Foss, the plaintiff's intestate, for some time previous to his death, which happened in October, 1833, held a note against the defendant, for $50; and on the day of his decease, and when he was entirely senseless, and no hopes were entertained of his recovery, one Jeremiah Prescott, to whom Foss was indebted in the sum of about $46, came, in company with the plaintiff, to the house of Foss; and, after some conversation, it was suggested to the wife of Foss, that she had better give up to Prescott the note her husband had against the defendant, and pay the debt due him, which after some hesitation she concluded to do; upon which the amount due Prescott was deducted from the amount of the note against the defendant, and a note for $4 or $5 was given by Prescott, payable to Foss, as a balance. The defendant afterwards paid Prescott the amount of his note. This suit was brought to recover the amount of the note, on the ground that the wife of Foss had no authority to deliver up the note to Prescott and have it applied in the manner before mentioned.

There was evidence, on the part of the defendant, tending to show that for several years previous to this transaction Foss's wife had been his general agent for transacting all his business, and that she was authorized to settle this concern in the manner she did; but the plaintiff insisted that if she had been agent, the situation of Foss at the time of the transaction, which was well known to her and the others concerned, operated in law as a revocation of her agency.

The court charged the jury, that if they were satisfied that the wife had been the general agent of her husband for several years previous, the situation in which he was placed when said business was transacted, although well known to her and Prescott, did not operate in law as a revocation of her agency. The jury returned a verdict for the defendant, and the plaintiff moved for a new trial.

Parker, C. J.—There is no pretense that a wife, as such, has any authority to dispose of the husband's goods, or adjust his affairs, by reason of his incapacity to transact business.

But it is contended, in this case, that the wife having had a general power to transact business for her husband previous to his illness, nothing but an express revocation of that power, or some oc-

mitted goods of his principal to a sub-agent for sale. The factor died, and his administrator collected from the sub-agent the proceeds from the sale of the goods. It was held that the death of the factor terminated his agency; hence, the administrator in receiving the proceeds did not receive them as administrator, but by the act of collection made himself agent for the principal.

DAVIS v. LANE.

[illegible]

[illegible] upon a promissory note.

It appeared in evidence that Foss, the [illegible], for some time previous to his decease which happened in [illegible], held a note against the defendant for $50; and on the eve of his decease and when he was entirely speechless and of course unconscious of his property, one Jeremiah Prescott to whom Foss was indebted in the sum of about $40, came, in company with the plaintiff, to the house of Foss; and after some conversation it was suggested to the widow of Foss that she had better give up to Prescott the note she held against the defendant, and pay the debt due him which after some hesitation she concluded to do: upon which the amount due Prescott was deducted from the amount of the note against the defendant and a note for $4 or $5 was given by Prescott, payable to Foss as a balance. The defendant afterwards gave Prescott an account of his note. This suit was brought to recover the amount of the note, on the ground that the wife of Foss had no authority to deliver up the note to Prescott and have it applied in the manner above mentioned.

The [illegible] on the part of the defendant, tending to show that for many years previous to this transaction Foss's wife had been the general agent for transacting all his business, and that she was authorized to settle his concerns in the manner she did; but the plaintiff insisted that if she had been acting in the situation of Foss at the time of the transaction, which was well known to her and the other [illegible] she was not to be considered as a [illegible] of her agency.

The court charged the jury, that if they were satisfied that the wife had been the general agent of her husband for several years previous the situation in which he was placed when said business was transacted, although well known to her and Prescott, did not operate as a [illegible] to her agency. The jury returned a verdict for the defendant, and the plaintiff moved for a new trial.

Parker, C. J.—There is no question that a wife, as such, has any authority to dispose of the husband's goods, or charge his estate, by reason of the necessity to manage business.

Nor is it contended, in this case, that the wife having had a general power to transact business for her husband previous to his decease, nothing but an express revocation of that power or some de-

[illegible] notice of his [illegible] a subsequent sale. The factor dies and his executor or administrator, from the circumstances, presumes [illegible] the sale of the goods. It was held that the fault of the factor [illegible] to convey; and it, the [illegible] are necessary to [illegible] the vendee's right as to [illegible], but to the act of selecting, made herself agent for the principal

currence which divests and transmits the property, as death or bankruptcy, will terminate her authority to act as the agent of her husband, and that she therefore might well dispose of the note in question, notwithstanding her husband was utterly insensible and incapable of any volition whatever; and this well known to her, and to Prescott, to whom she passed it, and notwithstanding he continued in that state until his decease.

The authorities show that the death of the constituent terminates the authority, unless the power is coupled with an interest so that it may be executed in the name of the agent: Harper v. Little, 2 Green R. 18; Hunt v. Rousmanier's Admr., 2 Mason's R. 244; s. c. 8 Wheat. R. 174; Waters v. King, 4 Camp. 274; 2 Livermore on Agency 302. So bankruptcy, on his part, operates as a revocation: Parker v. Smith, 16 East R. 386. So marriage of a single woman terminates a power to confess a judgment in her behalf; Anon, 1 Salk. 399; 2 Livermore on Agency 307.

In all these cases an end is put to the power of the principal to act, and, moreover, the operation of law transfers the estate, upon which the power might operate to the custody and control of others. In this latter respect these cases are unlike the one before us, and no authority has been cited or found which will directly settle the present case.

We are of opinion, however, that the authority of the agent, where the agency is revocable, must cease or be suspended by an act of Providence depriving the constituent of all mind and ability to act for himself, and that this doctrine can be sustained by very satisfactory principles.

An authority to do an act for and in the name of another presupposes a power in the individual to do the act himself, if present. The act to be done is not the act of the agent, but the act of the principal, and the agent can do no act in the name of the principal which the principal might not himself do, if he were personally present. The principal is present by his representative, and the making or execution of the contract, or acknowledgment of a deed, is his act or acknowledgment.

But it would be preposterous, where the power is in its nature revocable, to hold that the principal was in contemplation of law, present, making a contract, or acknowledging a deed, when he was in fact lying insensible upon his death bed, and this fact well known to those who undertook to act with and for him. The act done by the agent, under a revocable power, implies the existence of volition on the part of the principal. He makes the contract—he does the act. It is done through the more active instrumentality of another, but the latter represents his person and uses his name.

Farther, upon the constitution of an agent or attorney to act for another, where the authority is not coupled with an interest and not irrevocable, there exists at all times a right of supervision in the

principal and power to terminate the authority of the agent at the pleasure of the principal. The law secures to the principal the right of judging how long he will be represented by the agent and suffer him to act in his name. So long as, having the power, he does not exercise the will to revoke, the authority continues.

When, then, an act of Providence deprives the principal of the power to exercise any judgment or will on the subject, the authority of the agent to act should thereby be suspended for the time being; otherwise the right of the agent would be continued beyond the period when all evidence that the principal chose to continue the authority had ceased; for after the principal was deprived of the power to exercise any will upon the subject, there could be no assent, or acquiescence, or evidence of any kind to show that he consented that the agency should continue to exist. And, moreover, a confirmed insanity would render wholly irrevocable an authority, which, by the original nature of its constitution, it was to be in the power of the principal at any time to revoke.

It is for these reasons that we are of opinion that the insanity of the principal, or his incapacity to exercise any volition upon the subject, by reason of an entire loss of mental power, operates as a revocation, or suspension for the time being, of the authority of an agent acting under a revocable power. If, on the recovery of the principal, he manifests no will to terminate the authority, it may be considered as a mere suspension. And his assent to acts done during the suspension may be inferred from his forbearing to express dissent when they came to his knowledge: 1 Livermore on Agency, 300; Cairnes v. Bleecker.

The act of the agent in the execution of the power, however, may not in all cases be avoided on account of the incapacity. If the principal has enabled the agent to hold himself out as having authority, by a written letter of attorney, or by a previous employment, and the incapacity of the principal is not known to those who deal with the agent, within the scope of the authority he appears to possess, the transactions may be held valid and binding upon the principal. Such case forms an exception to the rule, and the principal and those claiming under him may be precluded from setting up his insanity as a revocation, because he had given the agent power to hold himself out as having authority and because the other party had acted upon the faith of it and in ignorance of any termination of it. They would be so precluded in the case of an express revocation, which was unknown to the other party: 2 Livermore on Agency 310; Salte v. Field, 5 D. & E. 215; 2 Greenleaf's R. 18. And a revocation by operation of law, on account of the insanity of the principal, cannot have a greater effect than the express revocation of the party himself. But this case is not of that character. Here there was full knowledge of the situation of the plaintiff's intestate, by Prescott, when he received the note.

principal and power to terminate the authority of the agent at the pleasure of the principal. The law accords to the principal the right of judging how long he will be represented by the agent and suffer him to act in his name. So long as, having the power, he does not exercise the will to revoke, the authority continues.

When, then, an act of Providence deprives the principal of the power to exercise any judgment or will on the subject, the authority of the agent to act should do the same. It is suspended for the same reason; otherwise the right of the agent would be continued beyond the period when all evidence that the principal chose to continue the authority had ceased, for after the principal was deprived of the power to exercise any will upon the subject there could be no assent, or acquiescence, or evidence of any kind to show that he consented that the agency should continue to exist. And, moreover, a confirmed insanity would render wholly irrevocable an authority, which, by the original nature of its constitution, it was to be in the power of the principal at any time to revoke.

It is for these reasons that we are of opinion that the insanity of the principal, or his incapacity to exercise any volition upon the subject by reason of the total loss of mental power, operates as a revocation, or suspension for the time being, of the authority of an agent acting under a revocable power. If, on the recovery of the principal, he does not will to terminate the authority, it may be considered as a mere suspension. And his assent to acts done during the insanity may be inferred from his forbearing to express dissent when they came to his knowledge: 1 Livermore on Agency, 309; Grimes v. Bleecker.

The act of the agent or the execution of the power, however, may not in all cases be avoided on account of the incapacity. If the principal has enabled the agent to hold himself out as having authority, by a written letter of attorney, or by a previous employment, and the insanity of the principal is not known to those who deal with the agent, within the scope of the authority he appears to possess, the transactions may be held valid and binding upon the principal. Such case forms an exception to the rule, and the principal and those claiming under him may be precluded from setting up his insanity as a revocation, because he had given the agent power to hold himself out as having authority and because the other party had relied upon the fact of it and in ignorance of the revocation of it. They would be so precluded in the case of an express revocation, which was unknown to the other party: 2 Livermore on Agency, 310; Sale v. Wells, 5 D. & E. 375; 2 Greenleaf's Ev. 68. And a revocation by operation of law, on account of the insanity of the principal, cannot have a greater effect than the express revocation of the party himself. But this case is not of that character. Here there was full knowledge of the situation of the principal's intestate by Freund, when he received the rents

The principle that insanity operates as a revocation cannot apply where the power is coupled with an interest, so that it can be exercised in the name of the agent, for such case does not presuppose any volition of the principal at the time, or require any act to be done in his name, and is not revoked by his death.

Whether it is applicable to the case of a power which is part of a security, or executed for a valuable consideration, and thus is by its terms or nature irrevocable, and which seems to be regarded in England as a power coupled with an interest (10 Barn. & Cres. 731; 4 Camp. 272), may be a question of more doubt: 2 Mason 249. Such a power could not be revoked by the principal, if his sanity was continued (2 Livermore 308), and any volition of his could not alter the case. Some of the reasons, therefore, which have been adverted to, would not exist in a case of that character. But a power of that kind is to be executed in the name of the principal; and it was held, in Hunt v. Rousmanier's Administrator, before cited, that the death of the principal operates as a revocation of it, for the reason that after that event no act can be done in his name, as if he himself performed it. This reason would not exist where he was still living; and perhaps he and others might in such case be precluded from setting up his insanity in avoidance of the act, on the ground that he would have had no right to interfere if sane, and had therefore no right to insist on his insanity as an objection.

It has been held, in England, that the insanity of one partner does not operate as a dissolution of the partnership, but that object must be attained through a court of equity: Sayer v. Bennet, cited 2 Ves. & Bea. 303; Gow on Part. (272). But the soundness of the principle may perhaps be doubted: Waters v. Taylor, 2 Ves. & Bea. 303; Groswold v. Waddington, 15 Johns. R. 57, 82. It certainly could not have been applied here prior to 1832, as we had before that time no court through whose decree in equity a dissolution could have been effected. Admitting it to be correct in its fullest extent, however, it would not affect this case, for each partner has an interest, by the partnership contract, and the interest of one partner would not be terminated by the insanity of another. In making a sale or contract he does not act as agent, but in his own right, and the partnership name may be used by one without any supposition that another acts individually or has any knowledge or volition in relation to the matter. But so long as the partnership continues, the act of the one binds the others; and as it is, in its effect, the act of all the partners, it may deserve great consideration whether the insanity of one, in the absence of any stipulation to the contrary, does not operate *ipso facto* as a dissolution of the partnership itself.

The result of the view we have taken is that the wife of the intestate had at the time no authority to dispose of this note to Prescott, and that he acquired no title to it, and had no right to receive

the money. We have already held, on a former case, in this suit, that a payment to him, by the defendant, under such circumstances, could not operate to discharge the note: 8 N. H. 224. The instructions to the jury were erroneous, but there is no agreement in the case by which we are authorized to enter judgment for the plaintiff, and the action must, therefore, be transferred to the Common Pleas for a new trial, if there is anything further in controversy between the parties.[1]

Section 4.—Irrevocable Agencies.

HUNT v. ROUSMANIER'S ADMINISTRATORS.

1823. Supreme Court of the United States. 8 Wheat. 174.

Appeal from the Circuit Court of Rhode Island.

The original bill, filed by the appellant, Hunt, stated that Lewis Rousmanier, the intestate of the defendants, applied to the plaintiff in January, 1820, for the loan of $1,450, offering to give, in addition to his notes, a bill of sale, or a mortgage of his interest in the brig Nereus, then at sea, as collateral security for the repayment of the money. The sum requested was lent; and on the 11th of January, the said Rousmanier executed two notes for the amount; and on the 15th of the same month, he executed a power of attorney, authorizing the plaintiff to make and execute a bill of sale of three-fourths of the said vessel to himself, or to any other person; and in the event of the said vessel, or her freight, being lost, to collect the money which should become due on a policy by which the vessel and freight were insured. This instrument contained, also, a proviso, reciting that the power was given for collateral security for the payment of the notes already mentioned, and was to be void on their payment; on the failure to do which, the plaintiff was to pay the amount there-

[1] *Accord:* Drew v. Nunn, L. R. 4 Q. B. D. 661.

"Notwithstanding the declaration of Chancellor Kent (2 Kent Com. 645) 'that the better opinion would seem to be that the fact of the existence of the lunacy must have been previously established by inquisition, before it could control the operation of the power,' the weight of authority, as well as sound reasoning lead to the conclusion that the after-occurring insanity of the principal operates, *per se*, as a revocation or suspension of the agency, except in cases where a consideration has previously been advanced in the transaction which was the subject-matter of the agency, so that the power become coupled with an interest; or where a consideration of value is given by a third person, trusting to an apparent authority in ignorance of the principal's incapacity." Depue, J., in M. & W. Refining Co. v. McMahon, 38 N. J. L. 536, 546.

Bankruptcy of the agent terminates the agency. Hudson v. Granger, 5 B. & A. 27; Audenried v. Betteley, 8 Allen (Mass.) 302.

Regarding the effect of the bankruptcy of the principal see Ex parte Snowball, L. R. 7 Ch. App. 534.

[illegible] [illegible] [illegible] [

of, and all expenses, out of the proceeds of the said property, and to return the residue to the said Rousmanier. The bill further stated that on the 21st of March, 1820, the plaintiff lent to the said Rousmanier the additional sum of $700, taking his note for payment, and a similar power to dispose of his interest in the schooner Industry, then also at sea. The bill then charged that on the 6th of May, 1820, the said Rousmanier died insolvent, having paid only $200 on the said notes. The plaintiff gave notice of his claim; and, on the return of the Nereus and Industry, took possession of them, and offered the intestate's interest in them for sale. The defendants forbade the sale; and this bill was brought to compel them to join in it. The defendants demurred generally, and the court sustained the demurrer, but gave the plaintiff leave to amend his bill.

The amended bill stated that it was expressly agreed between the parties, that Rousmanier was to give specific security on the Nereus and Industry, and that he offered to execute a mortgage on them. That counsel was consulted on the subject, who advised that a power of attorney, such as was actually executed, should be taken in preference to a mortgage, because it was equally valid and effectual as a security, and would prevent the necessity of changing the papers of the vessels, or of taking possession of them on their arrival in port. The powers were, accordingly, executed, with the full belief that they would, and with the intention that they should, give the plaintiff as full and perfect security as would be given by a deed of mortgage. The bill prayed that the defendants might be decreed to join in a sale of the interests of their intestate in the Nereus and Industry, or to sell the same themselves, and pay out of the proceeds the debt due to the plaintiff. To this amended bill, also, the defendants demurred, and on argument the demurrer was sustained, and the bill dismissed. From this decree the plaintiff appealed to this court.

Marshall, Ch. J.—The counsel for the appellant objects to the decree of the circuit court on two grounds. He contends: 1. That this power of attorney does, by its own operation, entitle the plaintiff, for the satisfaction of his debt, to the interest of Rousmanier in the Nereus and the Industry. 2. Or, if this be not so, that a court of chancery will, the conveyance being defective, lend its aid to carry the contract into execution, according to the intention of the parties.

We will consider: 1. The effect of the power of attorney. This instrument contains no words of conveyance or of assignment, but is a simple power to sell and convey. As the power of one man to act for another depends on the will and license of that other, the power ceases when the will, or this permission, is withdrawn. The general rule, therefore, is that a letter of attorney may, at any time, be revoked by the party who makes it; and is revoked by his death. But this general rule, which results from the nature of the act, has sustained some modification. Where a letter of attorney forms a part of a contract, and is a security for money, or for the perform-

ance of any act which is deemed valuable, it is generally made irrevocable in terms, or if not so, is deemed irrevocable in law. Although a letter of attorney depends, from its nature, on the will of the person making it, and may, in general, be recalled at his will, yet, if he binds himself for a consideration, in terms, or by the nature of his contract, not to change his will, the law will not permit him to change it. Rousmanier, therefore, could not, during his life, by any act of his own, have revoked this letter of attorney. But does it retain its efficacy after his death? We think it does not. We think it well settled, that a power of attorney, though irrevocable during the life of the party, becomes extinct by his death.

This principle is asserted in Littleton (§ 66), by Lord Coke, in his commentary on that section (52b), and in Willes' Reports (105, note, and 565). The legal reason of the rule is a plain one. It seems founded on the presumption that the substitute acts by virtue of the authority of his principal, existing at the time the act is performed; and on the manner in which he must execute his authority, as stated in Combes' Case, 9 Co. 766. In that case it was resolved that "when any has authority as attorney to do any act, he ought to do it in his name who gave the authority." The reason of this resolution is obvious. The title can, regularly, pass out of the person in whom it is vested, only by a conveyance in his own name; and this cannot be executed by another for him, when it could not, in law, be executed by himself. A conveyance in the name of a person who was dead at the time, would be a manifest absurdity.

This general doctrine, that a power must be executed in the name of a person who gives it, a doctrine founded on the nature of the transaction, is most usually engrafted in the power itself. Its usual language is, that the substitute shall do that which he is empowered to do in the name of his principal. He is put in the place and stead of his principal, and is to act in his name. This accustomed form is observed in the instrument under consideration. Hunt is constituted the attorney, and is authorized to make. and execute, a regular bill of sale in the name of Rousmanier. Now, as an authority must be pursued, in order to make the act of the substitute the act of the principal, it is necessary that this bill of sale should be in the name of Rousmanier; and it would be a gross absurdity that a deed should purport to be executed by him, even by attorney, after his death; for the attorney is in the place of the principal, capable of doing that alone which the principal might do.

This general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an "interest," it survives the person giving it, and may be executed after his death. As this proposition is laid down too positively in the books to be controverted, it becomes necessary to inquire what is meant by the expression, "a power coupled with an interest." Is it an interest in the subject on which the power is to be exercised, or is

ance of any act which is deemed valuable, it is generally made irrevocable in terms, or it not so, is deemed irrevocable in law. Though a [illegible] of attorney depends, from its nature, on the will of the person making it, and may, in general, be recalled at his will, yet if he binds himself for a consideration, or seems, or by the nature of his contract, not to change his will, the law will not permit him to change it. Rousmanier therefore, could not, during his life, by any act of his own, have revoked this letter of attorney. But does it remain in force after his death? We think it does not. We think it well settled that a power of attorney, though irrevocable during the life of the party, becomes extinct by his death.

This principle is asserted in Littleton (§ 68), by Lord Coke in his commentary on that section (52a), and in Willes' Reports (305, note, and 565). The legal reason of the rule is a plain one. It seems founded on the presumption that the subject matter of it is or might be [illegible] of his principal existing at the time the act is performed, and on the manner in which he must execute his authority. In Hunt v. Rousmanier's Adm'rs (8 Wheat. 174), in error from this court, it was resolved that "when an authority or attorney to do any act is sought to be [illegible] the question arises whether the power has been executed. The reason of this rule is obvious. The act may, regularly, proceed not of the person whose [illegible] is examined, but of a conveyance of his own estate, and [illegible] is executed, or another act done, after it could not, in [illegible] consequence of the time to a person who was not [illegible] would be a nonentity.

The general question, when a power must be executed in the name of a person who gives it, depends, indeed, on the nature of the transaction. It must usually be engrafted in the power itself. Its usual language is that the substitute shall do that which he is empowered to do in the name of his principal. He is put in the place and stead of his principal, and acts as in his name. This accustomed form is observed in the instrument under consideration. Jesse is appointed the attorney, and is authorized to make and execute a regular bill of sale in the name of Rousmanier. Does, as an authority must be pursued, in order to make valid any of the substitutes the act of the principal, does the bill of sale, to be valid, purport to be in the name of Rousmanier, and it would be a strange absurdity that a deed should purport to be executed by him, even by attorney, after his death, for the attorney is in the place of the principal, capable of doing that which the principal might do.

This general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an "interest," it survives the person giving it, and may be executed after his death. As this proposition is laid down very positively, in the book to be commented, it becomes necessary to ascertain what is meant by the expression, "a power coupled with an interest." Is it a reference to the subject on which the power is to be exercised, or is

it an interest in that which is produced by the exercise of the power? We hold it to be clear that the interest which can protect a power after death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing. The words themselves would seem to import this meaning. "A power coupled with an interest" is a power which accompanies, or is connected with an interest. The power and the interest are united in the same person. But if we are to understand by the word "interest," an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases when the interest commences, and, therefore, cannot, in accurate law language, be said to be "coupled" with it.

But the substantial basis of the opinion of the court on this point, is found in the legal reason of the principle. The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which, in such a case, is the act of the principal, to be legally effectual, must be in his name, must be such an act as the principal himself would be capable of performing, and which would be valid if performed by him. Such a power necessarily ceases with the life of the person making it. But if the interest, or estate, passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. The estate, being in him, passes from him by a conveyance in his own name. He is no longer a substitute, acting in the place and name of another, but is a principal acting in his own name, in pursuance of powers which limit his estate. The legal reason which limits a power to the life of the person giving it, exists no longer, and the rule ceases with the reason on which it is founded. The intention of the instrument may be effected without violating any legal principle.

This idea may be in some degree illustrated by examples of cases in which the law is clear, and which are incompatible with any other exposition of the term "power coupled with an interest." If the word "interest," thus used, indicated a title to the proceeds of the sale, and not a title to the thing to be sold, then a power to A to sell for his own benefit, would be a power coupled with an interest; but a power to A to sell for the benefit of B, would be a naked power, which could be executed only in the life of the person who gave it. Yet, for this distinction, no legal reason can be assigned. Nor is there any reason for it in justice; for, a power to A, to sell for the benefit of B, may be as much a part of the contract on which B advances his money as if the power had been made to himself. If this were the true exposition of the term, then a power to A to sell for the use of B, inserted in a conveyance to A, of the thing to be sold,

would not be a power coupled with an interest, and, consequently, could not be exercised after the death of the person making it; while a power to A to sell and pay a debt to himself, though not accompanied with any conveyance which might vest the title in him, would enable him to make the conveyance, and to pass a title not in him, even after the vivifying principle of the power had become extinct. But every day's experience teaches us that the law is not as the first case put would suppose. We know that a power to A to sell for the benefit of B, engrafted on an estate conveyed to A, may be exercised at any time, and is not affected by the death of the person who created it. It is, then, a power coupled with an interest, although the person to whom it is given has no interest in its exercise. His power is coupled with an interest in the thing which enables him to execute it in his own name, and is, therefore, not dependent on the life of the person who created it.

The general rule, that a power of attorney, though irrevocable by the party during his life, is extinguished by his death, is not affected by the circumstance that testamentary powers are executed after the death of the testator. The law, in allowing a testamentary disposition of property, not only permits a will to be considered as a conveyance, but gives it an operation which is not allowed to deeds which have their effect during the life of the person who executes them. An estate given by will may take effect at a future time or on a future contingency, and, in the meantime, descends to the heir. The power is, necessarily, to be executed after the death of the person who makes it, and cannot exist during his life. It is the intention that it shall be executed after his death. The conveyance made by the person to whom it is given, takes effect by virtue of the will, and the purchaser holds his title under it. Every case of a power given in a will is considered in a court of chancery as a trust, for the benefit of the person for whose use the power is made, and as a devise or bequest to that person.

It is, then, deemed perfectly clear that the power given in this case is a naked power, not coupled with an interest, which, though irrevocable by Rousmanier himself, expired on his death.[1] * * *[2]

[1] A portion of the opinion not dealing with the question of irrevocability is omitted. The court reversed the decree of the circuit court, and remanded the cause to that court, with directions to permit the defendants to withdraw their demurrer, and to answer the bill of the complainants.

[2] "A power coupled with an interest cannot be revoked by the person granting it; but it is necessarily revoked by his death. How can a valid act be done in the name of a dead man?" Lord Ellenborough in Watson v. King, 4 Camp. 272, 274. Followed in Frederick's Appeal, 52 Pa. St. 338.

"Where an authority or power is given for a valuable consideration, or is coupled with an interest, or is part of a security for the payment of money or the performance of some other lawful act, it is irrevocable, whether so expressed upon its face or not." Searls, C., in Frink v. Roe, 70 Cal. 296, 309.

See Terwilliger v. Ontario, etc., R. R. Co., 149 N. Y. 86.

would not be a power coupled with an interest, and consequently, could not be executed after the death of the person making it; while a power to A to sell and pay a debt to himself, though accompanied with any conveyance which might vest the title in him, would enable him to make the conveyance, and to pass a valid title to him, even after the surviving principal of the power had become extinct. But every day's experience testifies to the distinction as to the first case put. We know that a power to A to sell for the benefit of B, originally given to A, may be executed at any time, and is not affected by the death of the person who created it. It is, then, a power coupled with an interest, although the person to whom it is given has no interest in its exercise. His power is coupled with an interest in the thing which enables him to execute it in his own name, and is, therefore, not dependent on the life of the person who created it.

The general rule, that a power of attorney, though irrevocable by the party during his life, is existing naked by his death, is not affected by the circumstance that testamentary powers are executed after the death of the testator. The law, in allowing a testamentary disposition of property, not only permits a will to be considered as a conveyance, but gives it an operation which is not allowed to deeds which have their effect during the life of the person who executes them. The same power to will may take effect at a future time or not, and in the meantime, descends to the heir. The power to convey can be executed after the death of the person who makes it, and cannot exist during his life. It is the intention that it shall be executed after his death. The conveyance made by the person to whom it is given, takes effect by virtue of the will, and the purchaser holds his title under it. Every case of a power given in a will is considered in a court of chancery as a trust, for the benefit of the person for whose use the power is made, and as a devise or bequest to that person.

It is, then, deemed perfectly clear that the power given in this case is a naked power, not coupled with an interest which, though irrevocable by Rosemanie Holcomb[1], expired on his death.[2]

[1] A portion of the opinion not dealing with the question of irrevocability is omitted. The court reversed the decree of the circuit court and remanded the cause to that court with directions to permit the defendants to withdraw their demurrer and to answer the bill of the complainants.

[2] "A power coupled with an interest cannot be revoked by the person granting it; but it is necessarily revoked by his death. How can a deed not be done in the name of a dead man?" Lord Hardwicke in Watson v. King, 4 Camp. 272, 274. Followed in Jennings' Appeal, 42 Pa. St. 488.

"Where an authority or power is given for a valuable consideration, or is coupled with an interest, as is part of a security for the payment of money or the performance of some other valid act, it is irrevocable, whether or not expressed upon its face to be so." Smith, C. J., in Hall v. Hall, 70 Pa. St. 304. See Tredwell v. Graham, 19 N. C. (Ire.) 147, 27 Am. Dec.

HARTLEY AND MINOR'S APPEAL.

1866. SUPREME COURT OF PENNSYLVANIA. 53 Pa. St. 212.

APPEAL from the Orphans' Court of Greene County, by Samuel Hartley and John Minor.

Hannah D. Gallion, on the 30th day of June, 1866, made to Hartley and Minor a power of attorney to collect and receive all money and property coming to her as heir of John Douglass, deceased, with power to convey her interest in the real estate of the decedent, etc., "the said Hartley and Minor to receive as compensation for their services herein one-half of the net proceeds of my interest in said estate which may be collected or received by them as my attorneys, after paying all costs and expenses, they to receive no further compensation for any service they may render or expenses they may incur or pay as my attorneys."

On the 20th of July, 1866, she gave another power of attorney to Livingston Howland for the same purpose, and in it revoked that to Hartley and Minor. On the 29th of September, 1866, Hartley and Minor, as attorneys of Hannah Gallion, petitioned the Orphans' Court of Greene county for a citation to the administrator, etc., of Douglass to settle his account. This was objected to because of the power of attorney to Howland. On this ground the court refused to award the citation, and dismissed the petition. Hartley and Minor appealed from this decree, and assigned it for error.

THOMPSON, J.—There was no error committed by the court below in holding the power of attorney of Hannah Gallion to the appellants to be revocable. It was an ordinary agency, constituted by letter of attorney, to act for her to enforce a settlement of his accounts by the administrator of her father's estate, in which she was interested, and to collect any moneys or property that might belong, or be coming to her. For these services the attorneys were to have one-half of the net proceeds of what they might receive or recover for her. The plaintiffs in error suppose that this clause rendered the power irrevocable by their principal, under the idea that it was a power coupled with an interest. This was a mistake, as all the authorities show. To impart an irrevocable quality to a power of attorney in the absence of any express stipulation, and as the result of legal principles alone, there must co-exist with the power an interest in the thing or estate to be disposed of or managed under the power. An instance of frequent occurrence in practice may be given of the assignment of vessels at sea, with a power to sell for the benefit of the holder of the power, or of anybody else who may have advanced money and who it was agreed should be secured in that way. So where securities have been transferred with a power to sell, and generally, I presume, in all cases of property pledged for the security of money where there is an accompanying authority to sell to reimburse the lender

or creditor. In Hunt v. Rousmanier, 8 Wheat. 174, this doctrine is clearly and fully elucidated in the opinion of Marshall, C. J. In Bancroft v. Ashhurst, 2 Grant 513, a case tried at *nisi prius* before me, at which my brethren sat as adsessors, there is a pretty full examination of the question herein involved, and all the authorities referred to, and the conclusion is fully in accordance with Hunt v. Rousmanier, and sustains the above view of a power coupled with an interest.

In the case in hand the power and the interest could not co-exist. The interest the appellants would have would be in the net proceeds collected under the power, and the exercise of the power to collect the proceeds would *ipso facto* extinguish it entirely, or so far as exercised. Hence the appellants' interest would properly begin when the power ended. This distinction is noticed in Hunt v. Rousmanier; but neither by this test, nor any other, was the power of attorney in question irrevocable, and this judgment must be affirmed.

Judgment affirmed.[1]

KNAPP v. ALVORD.

1843. Court of Chancery of New York. 10 Paige 205.

This case came before the court upon exceptions to the report of a master to whom it was referred to take and state the account of the defendant as the administratrix of W. Alvord, deceased, and to report the amount due to the complainant and to the other creditors of the decedent; and the only question was as to the right of J. Meads to retain, out of the estate, of the decedent, the amount of two notes upon which he was endorser, the estate of the decedent being insufficient to pay all his debts. The master decided in favor of the right of Meads to retain, and allowed to the administratrix the amount retained by Meads out of the proceeds of the property of the decedent, and which had been so retained with her assent. Rathbone and Smith, two of the creditors who had come in and proved their debts under the decree, excepted to that part of the report. The facts on which the question arose were as follows: The decedent, W. Alvord, for some time previous to his death, carried on the business of a cabinet-maker in the city of Albany. In the fall of 1837, Alvord being in bad health, Meads, who had formerly been his co-partner, consented to assist him gratuitously in the care and management of his business. In the latter part of November in that year, the decedent having determined to spend the winter at the south, on ac-

[1] The authority of an agent to whom a negotiable promissory note has been endorsed for collection is not revoked by the death of the owner, as the endorsement passes the legal title to the note. Moore v. Hall, 48 Mich. 143.

count of his health, applied to Meads to take the general charge of his business during his absence; to which Meads consented. At that time a note of $1,800, drawn by Alvord and endorsed by Whitney and Van Vechten as his sureties, was held by the Mechanics' & Farmers' Bank, and was payable December 9. Alvord also owed another note to H. Rector, for $428.34, endorsed by Meads, and which was payable December 12, 1837. To provide for the payment of these notes, or others which might be given in renewal thereof, and to enable Meads the better to manage his business during his anticipated absence, Alvord executed an instrument, bearing date November 22, 1837, constituting Meads his agent and attorney to carry on, conduct, and manage his business as a cabinet-maker, in his absence; to purchase and procure stock and materials; to hire, pay and discharge workmen; to collect and receive moneys, etc., and to apply the same in his said business; or to the support of the decedent's family, or to the payment or security of his debts and liabilities. That instrument or power also contained the following clause: "And I hereby expressly authorize and empower the said Meads to sell, assign, transfer, and dispose of, at any time, or in any manner which he may deem necessary or advisable, all or any furniture, stock, property, notes, claims, or other effects whatsoever, which now are or may at any time be in his hands, belonging to me, and to apply the same and the proceeds thereof to the security or payment in whole or in part, of a certain note for about the sum of $1,800, drawn by me and endorsed by S. Whitney and J. T. B. Van Vechten, and discounted at the Mechanics' & Farmers' Bank; or any note or notes which may be given in lieu or renewal thereof or of any part thereof; and to the payment or security of any note or notes drawn by me, and endorsed, or which may have been endorsed, by the said Meads, or for which he may become responsible." The day after the execution of this instrument the decedent attended at his shop and delivered over his account books, etc., to Meads, and put him into actual possession, and charge of the shop and business, and the property therein and Meads then opened, or caused to be opened, a new cash-book in the presence of Alvord. On the same day Alvord gave to Whitney, one of the endorsers upon the $1,800 note, a mortgage upon the furniture, lumber, and stock in trade of the said cabinet-maker's business, to secure him as the endorser of that note or of any other note which might be given in lieu or renewal of it; which mortgage was filed in the clerk's office December 26 thereafter. Alvord left for the south a day or two after the date of these instruments, having left his signatures in blank with Meads, to enable him to renew the notes if necessary; and he died at Savannah, in Georgia, December 18, 1837.

When the $1,800 note became due, December 9, Meads wrote a new note for the same amount over one of the blank signatures, payable in ninety days, which was also endorsed by Whitney and

Van Vechten, and given to the bank in renewal of the note. And as the bank required further security, Meads put his name upon the note as a subsequent endorser. December 12, when the note of Rector became due, Meads filled up another note over one of Alvord's blank signatures, and endorsed the same himself and gave it in renewal of the old note; which note was also made payable in ninety days. Both of these renewal notes were duly protested for non-payment, and were afterwards taken up by Meads as endorser. After the death of Alvord, Meads claimed a lien upon the property and assets of the cabinet-making business in his hands, for all responsibilities which he had incurred, as endorser upon these notes or otherwise; and he continued in the possession and control of the property, with the assent of the administratrix, until April, 1838, when the property was sold at auction, under his direction, and with her assent. The amount of the notes was retained by him out of the proceeds of the sale, and the residue of the proceeds was accounted for to the administratrix.

THE CHANCELLOR.—The personal mortgage to Whitney not being filed till after the death of Alvord, and not being accompanied by an immediate delivery and continued possession of the property, it may be doubtful whether it was sufficient to give Whitney, who was liable to Meads as the last endorser of the note of $1,800, a preference in payment over the other creditors of Alvord. This case, however, does not turn upon that question; as I am satisfied that an equitable lien upon the property was created by the special clause in the power in reference to the $1,800 note and to notes drawn by Alvord and endorsed by Meads. And as that instrument was accompanied by an actual delivery and continued change of possession of the property until it was converted into money and applied in payment of two several notes, it was not necessary that the instrument which created that lien should be recorded, under the act of 1833. It is the duty of the court to give such a construction to the language of a written instrument as to carry into effect the intention of the parties, so far as that intention can be collected from the whole instrument and the situation of the parties at the time the writing was executed. And I think no one who reads this special clause, in connection with the evidence, or rather the admissions, of extrinsic facts which are proper to be taken into consideration, can believe that Alvord did not intend to give to the endorsers of the $1,800 note, and to Meads, as the endorser of the Rector note and other notes which he might thereafter endorse, a beneficial interest in the execution of this power, for their security and indemnity. It clearly shows that Alvord anticipated that it would probably be necessary for Meads to incur further responsibility as his endorser, in the discharge of the duties of his agency, and that something more than an ordinary power of attorney was necessary to protect him from loss. And as the possession of the property was delivered to Mead, in connec-

Van Vechten, and given to the bank in renewal of the note. And as the bank required further security, Meeds put his name upon the note as a subsequent endorser. He called on Alvord for the note of Rector became due, Meeds called on another [illegible] of Alvord's bank signatures, and procured the same [illegible] and gave it in renewal of the old note, which note was also made payable in ninety days. Both of these renewal notes were also protested for non-payment, and were afterwards taken up by Meeds as endorser. After the death of Alvord Meeds claimed a lien upon the property and assets of the estate in his hands, for all responsibilities which he had incurred, as endorser upon these notes or otherwise; and in continuing in the possession and control of the property, with the assent of the administratrix, until April, 1838, when the property was sold at auction, under his direction, and with her assent. The amount of the notes was retained by him out of the proceeds of the sale, and the residue of the proceeds was accounted for to the administratrix.

The Conclusion.—The personal mortgage to Whitney not being filed till after the death of Alvord, and not being accompanied by an immediate delivery and continued possession of the property, it may be doubtful whether it was sufficient to give Whitney, who was liable as Meeds as a joint endorser of the note of $1,800 a preference over [illegible] the other creditors of Alvord. This case, however, [illegible] this question; as I am satisfied that no equitable lien upon the property was created by the special clause in the power in reference to the $1,800 note and to notes drawn by Alvord and endorsed by Meeds. And as that instrument was accompanied by an actual delivery and continued change of possession of the property until it was converted into money and applied in payment of two several notes, it was not necessary that the instrument which created that lien should be recorded, under the act of 1843. It is the duty of the court to give such a construction to the language of a written instrument as to carry out, effect the intention of the parties, so far as that intention can be collected from the whole instrument and the situation of the parties at the time the writing was executed. And I think no one who reads this special clause in connection with the evidence, or rather the admissions, of extrinsic facts which are proper to be taken into consideration, can doubt that Alvord did not intend to give to the endorsers of the $1,800 note and to Meeds, as the endorser of the Rector note and other notes which he might thereafter endorse, a beneficial interest in the execution of this power, for their security and indemnity. It clearly shows that Alvord anticipated that it would probably be necessary for Meeds to incur further responsibility as his endorser in the discharge of the duties of his agency, and that something more than an ordinary power of attorney was necessary to protect him from loss, and [illegible] of the possession of the property was delivered to Meeds to consti-

tion with this power to dispose of it, for the security and protection of himself and the other endorsers, the property must be considered as pledged to him for that purpose. The power to sell, therefore, was coupled with an interest in the property thus pledged, and survived. Bergen v. Bennett, 1 Cai. Cas. in Err. 1; Raymond v. Squire, 11 Johns. 53. In the case decided by the supreme court of the United States (Hunt v. Rousmanier, 8 Wheat. 174) there was no actual pledge of the property. But a mere power of attorney was executed authorizing the plaintiff to transfer it in the name of Rousmanier. It was upon that ground, as I understand the case, that Chief Justice Marshall held that the power was not coupled with any interest in the vessels. And I presume his opinion upon that point would have been different if the power had been accompanied by an actual delivery of the vessels as a pledge for the payment of the debt. But even in that case the court protected the rights of Hunt as an equitable mortgagee of the vessels, though the decision was placed on the debatable ground that a party may be relieved in equity against a mistake of law merely.

Being satisfied that Meads had a lien upon the property in his hands, and a right to retain for the amount of these notes, under the special clause in the written power executed by Alvord, it is not necessary to inquire whether he is not also to be considered as the factor of Alvord so as to entitle him to retain for his advances and liabilities, entirely independent of this special provision in the power of attorney to him. If the arrangement between Alvord and Meads gave to the latter the character of a factor, there can be no doubt as to his lien upon the property in his hands, and his right to retain for all his advances and responsibilities in the business with which he was entrusted by his principal. Although it was doubted previous to the case of Kruger v. Wilcox, Amb. 252, it is now well settled that a factor has a lien and may retain for a general balance, including responsibilities incurred in the execution of his agency. Whit. Lien 103; 2 Kent. Com. 640; Story Ag., § 34. And the case of Foxcraft v. Wood, 4 Russ. 487, was probably decided upon the ground that the arrangement under which the business at Birmingham was carried on constituted Foxcraft the factor of Lanning, although he received a fixed salary instead of the usual mercantile commission for his services.

The decision of the master was right in allowing to the administratrix the amount retained by Meads for the two notes. The exceptions are therefore overruled, with costs, and the report of the master is confirmed.[1]

[1] A power of attorney read: "For value received, we hereby sell, assign, and transfer to A the shares of stock within mentioned, and hereby authorize him to make the necessary transfer on the books of the corporation." It was held that this power was coupled with an interest, and could not be revoked by the donor of the power. Skinner v. Fort Wayne, etc., R. R., 58 Fed. Rep. 55.

In an agreement giving to an agent the exclusive power to sell certain land it was stipulated that he was to receive as compensation for his services "an undivided one-fourth interest in the proceeds of sale when sold as aforesaid." It was held that this agency may be revoked by the principal. Chambers v. Seay, 73 Ala. 372. In page 378, Somerville, J.. said: "To be irrevocable, it seems now well settled, that the power conferred must create an interest in the thing itself, or in the property which is the subject of the power. In other words 'the power and estate must be united and co-existent,' and, possibly, of such a nature that the power would survive the principal in the event of the latter's death, so as to be capable of execution in the name of the agent."

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